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In The

Supreme Court of the United States

October Term, 1997

DISTRICT LODGE 64, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, AND ITS LOCAL LODGES 883, 1088, AND 1142,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

BROWN & SHARPE MANUFACTURING COMPANY,

Intervenor.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

MARC B. GURSKY
GURSKY LAW ASSOCIATES
10 Davol Square
Providence, RI 02903
(401) 454-7400

ALLISON BECK
General Counsel
2000 Machinists Place
Upper Marlboro, MD 20772-2867
(301) 967-5400

LAUREN E. JONES
Counsel of Record
MICHAEL T. ESKEY
JONES ASSOCIATES
72 South Main Street
Providence, RI 02903
(401) 274-4446

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Does the National Labor Relations Board have authority to interpret and apply equitable tolling provisions of borrowed federal statutes of limitation in a way that conflicts with relevant decisions of federal courts?

2. Where a claim for equitable tolling is based on fraudulent concealment of material facts, should federal courts recognize and apply the principle that a charged party who elects to cooperate in an investigation and who volunteers favorable information is under a duty to disclose any additional material information necessary to prevent the investigator from being misled by the selective disclosures of favorable information?

3. Where the National Labor Relations Board failed to consider material evidence indicating that a charged party gave an investigator a false impression of full and voluntary cooperation, when in fact the charged party withheld material evidence, did the court of appeals erroneously defer to the board's determination that the charged party did not engage in an affirmative act of concealment?

4. Where reasonably possible, must the National Labor Relations Board take affirmative steps to avoid the extinction of rights granted under the National Labor Relations Act which may be caused by the board's own acts of negligence?

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3. *District Lodge 64, Intern. Ass'n of Machinists and Aerospace Workers, AFL-CIO v. NLRB*, 50 F.3d 1088 (D.C. Cir. 1995); App. 22-38.

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7. *Brown & Sharpe Mfg. Co.*, 299 N.L.R.B. 591 (1989) (Administrative Law Judge decision); App. 89-189.

8. *Brown & Sharpe Mfg. Co.*, (unreported order) (1986) (Administrative Law Judge decision); App. 190-208.

BASIS FOR JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit entered on December 12, 1997. Jurisdiction is conferred by 28 U.S.C. § 1254.

STATUTES INVOLVED

Section 10(b), National Labor Relations Act [NLRA or Act], provides in relevant part:

> [N]o complaint shall issue based on any unfair labor practice occurring more than six months prior to ~~the~~ filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made. * * *

29 U.S.C. § 160(b).

Section 3(d), NLRA, provides in relevant part:

> [The General Counsel of the Board] shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. * * *

29 U.S.C. § 153(d).

STATEMENT OF THE CASE

Summary Of Reasons For Granting The Writ

The petitioners, District Lodge 64, International Association of Machinists and Aerospace Workers, AFL-CIO, and its Local Lodges 883, 1088, and 1142 (union), request that the Court issue a *Writ of Certiorari* to correct decisions of the United States Court of Appeals for the District of Columbia Circuit. The decisions involve important questions of federal law concerning the

authority of respondent, National Labor Relations Board (board), to interpret and apply equitable tolling standards to a borrowed federal statute of limitation. Declaring its independence from federal courts, the board announced in its second decision in this case that it does "not necessarily adopt all the glosses on the fraudulent concealment doctrine set forth by various Federal courts." *Brown & Sharpe Mfg. Co.*, 312 N.L.R.B. 444, n.3 (1993). This view conflicts with decisions of this Court which establish the primacy of federal judicial determination regarding federal statutes of limitation where Congress is silent. *See, e.g., DelCostelio v. Teamsters*, 462 U.S. 151, 158-60, 103 S. Ct. 2281, 2287-88 (1983). Federal judicial primacy is all the more clear with tolling, as federal common law implies an equitable tolling provision in every federal statute of repose, regardless of the source or manner of adoption. *See Holmberg v. Armbrecht*, 327 U.S. 392, 395, 66 S. Ct. 582, 584 (1946). It is one thing for the board to "borrow" a federal statute of limitations and acknowledge that it is subject to equitable tolling, as it did in *Ducane Heating Corp.*, 273 N.L.R.B. 1389, 1390 (1985). It is quite another thing, however, for the board to claim, as it does here, to have authority to interpret and apply equitable tolling provisions of borrowed federal statutes in a way that conflicts with relevant decisions of federal courts.

Confident of its authority to strike off in its own direction,[1] in its third decision in this case, the board

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[1] In fact, this view was encouraged by the court of appeals. *See, e.g., District Lodge 64, Intern. Ass'n of Machinists and Aerospace Workers, AFL-CIO v. NLRB*, 50 F.3d 1088, 1094 (D.C. Cir. 1995) (board is normally free to adopt its own standard).

applied a remarkably narrow view of equitable tolling, which, in response to a dissenting opinion from the board's chairman, it reasoned was necessary to ensure voluntary cooperation with board investigations. *Brown & Sharpe Mfg. Co.*, 321 N.L.R.B. 924, 925 (1996). Notwithstanding its policy motives (which provided it no authority to misinterpret federal common law), the board's decision was founded on erroneous legal suppositions and factual conclusions.

Perhaps influenced by the board's assertion of policy, the court of appeals deferred to the board's decision without testing its legal foundations. *District Lodge 64, Intern. Ass'n of Machinists and Aerospace Workers, AFL-CIO v. NLRB*, 130 F.3d 1083, 1087 (D.C. Cir. 1997). In so doing, the court of appeals erroneously approved a concept of fraudulent concealment applied to equitable tolling which is inconsistent with the decisions of several other courts of appeals. Here, the court of appeals' deferential review of the board's factual determination that no fraudulent concealment occurred to toll the statute of limitations is completely at odds with the court's prior decision in this case and the second decision of the board.

The board attributes its denial of the union's right to a hearing on the merits of its timely filed and apparently valid unfair labor practice charges to the negligence of the General Counsel's investigator. This raises fundamental questions concerning the nature of the union's rights under the Act, and the duty of the board to protect those rights from being extinguished by the board's negligence. *See Mourning v. NLRB*, 505 F.2d 421, 424, n.10 (D.C. Cir. 1974).

There are a number of ways in which the board might have avoided visiting the consequences of its own misfeasance on the union. Instead, it chose simply to attribute the dismissal of the union's charges exclusively to the investigatorial misfeasance of the General Counsel (against whom the union lacks recourse) while ignoring material evidence indicating the apparent malfeasance of the charged party. In the context of this *sui generis* case, the result has been tantamount to striking down the well-established principle that no man can take advantage of his own wrong.

> Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitation.

Glus v. Brooklyn Eastern Dist. Terminal, 359 U.S. 231, 232-33, 79 S. Ct. 760, 762 (1959).

Statement Of Facts And Procedural History[2]

The up-and-down 17-year history of this case chronicles the unsuccessful efforts of the union to obtain a hearing on the merits of its timely filed charges that Brown & Sharpe Manufacturing Company (the company), intervenor in this matter, committed a series of unfair

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[2] So far, there have been three decisions of the NLRB and three decisions of the court of appeals. In addition, an administrative law judge rendered two decisions. All of these decisions are included in the appendix filed with this brief. This statement of facts is drawn from the various decisions.

labor practices by bargaining in bad faith and thus provoking a strike which continues to this day.

In July 1981 the union requested negotiations on a new collective bargaining agreement. Shortly thereafter the company formed a steering committee to examine the existing agreement, propose changes, and forecast the union's reaction. The committee prepared position papers and kept minutes of its meetings.

Bargaining between the union and the company began on September 4, 1981. In the course of the bargaining the company maintained that some issues were "absolute," meaning that the company insisted such issues must be included in any new agreement. Although a number of issues separated the parties, the "absolutes" figured prominently among the issues which led the union to strike on October 19, 1981. Negotiations broke down and by the end of February 1982 they had been at an impasse for some time.

On November 5, 1981, and March 18, 1982, the union timely filed two sets of unfair labor practice charges alleging that the company had failed to bargain in good faith, thereby violating §§ 8(a)(1) and 8(a)(5) of the NLRA. The board's General Counsel began to investigate the charges, which centered on the union's allegation that the company had engaged in illegal "surface bargaining."[3] In a seven-hour meeting with an investigator from

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[3] As recognized by the Administrative Law Judge who heard the evidence, surface bargaining is "[t]he antithesis of bargaining in good faith * * * ." A party engaged in surface bargaining "attempts to make it appear that it is willing to reach an agreement, although it has no intention to do so." App. 164.

the General Counsel's office, the company produced witnesses who sought to convince and persuade the investigator that it did nothing wrong and, more specifically, that it bargained in good faith. Additionally, at the investigator's request, the company provided bargaining notes, correspondence, and proposals and counter-proposals from the period beginning with the parties' negotiating sessions in September 1981.[4] The company described what occurred during the negotiations and its reasons for taking the positions it did. The company represented to the investigator that the company had certain absolutes that were essential to its continued viable operation. Based on the company's portrayal, the investigator believed that the company was fully cooperating with the investigation.

Based on the investigation, the General Counsel declined to issue a complaint and dismissed the union's charges without a hearing. The board denied the union's appeal of the dismissal. Then, on July 30, 1982, the union discovered that the company had been sued by its former industrial relations director, David Waterman, who claimed that he had been wrongfully discharged for refusing to engage in surface bargaining during the negotiating sessions with the union. Waterman's allegations provided the basis for a third unfair labor practice charge, filed by the union on September 29, 1982. The union asserted that the company's firing of Waterman for

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[4] Although the union had informed the investigator about the steering committee, the investigator did not ask the company about the steering committee or request the steering committee documents.

refusing to surface bargain showed that the company had never intended to bargain in good faith. When the third charge was investigated, the General Counsel discovered various documents prepared by the company's steering committee, including minutes of steering committee meetings and position papers. These documents supported the union's charges of surface bargaining by showing that the company's "absolutes" were actually less critical than the company had represented during the negotiations and during the investigation into the union's original charges. Relying on the discovery of the steering committee documents, on September 27, 1983, the General Counsel reinstated the union's previously dismissed unfair labor practice charges. On December 7, 1983, the General Counsel issued a complaint which included the third unfair labor practice charge as well as the earlier two charges.

Hearings before an administrative law judge began in 1984 and eventually concluded in 1989. The company denied surface bargaining and moved to dismiss that part of the complaint which contained the reinstated charges: the company claimed that those charges were barred by a six-month limitations period. The ALJ reserved decision on the company's motion, prompting the company to take a special appeal to the board. While that appeal was pending, the board decided *Ducane Heating Corp.*, 273 N.L.R.B. 1389 (1985), *enforced without opinion*, 785 F.2d 304 (4th Cir. 1986). There the board held that a six-month limitations period, borrowed from § 10(b) of the NLRA, applied to the General Counsel's reinstatement of dismissed charges "absent special circumstances in which a [charged party] fraudulently conceals the operative facts

underlying the alleged violation." 273 N.L.R.B. at 1390. In light of its decision in *Ducane*, the board granted the company's appeal and remanded the case to the ALJ for reconsideration, ordering the union to show cause why the company's motion to dismiss should not be granted.

In April 1986 the ALJ issued a decision, which noted that, while under the pre-*Ducane* rule the General Counsel had authority to reinstate dismissed charges at any time based on newly discovered evidence, *Ducane* required dismissal of the reinstated charges because the six-month limitations period had run prior to their reinstatement. The ALJ found no fraudulent concealment. He based that finding on his conclusion that *Ducane*'s fraudulent concealment exception is dependent upon a duty to reveal an operative fact. He went on to hold that because the General Counsel's original investigator had not requested that the company produce the steering committee documents in 1982, the company had no duty to disclose the steering committee documents. The ALJ reiterated that position in a 1989 decision which dismissed the remaining charges of the union's complaint.[5] The union appealed the dismissal of all of the charges to the board.

In August 1990 the board issued its first decision and order, which affirmed the ALJ's decision, but on different grounds.[6] The board found that even if the company had fraudulently concealed the steering committee documents, the charges were properly dismissed because the

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[5] The 1989 ALJ decision is included in the appendix to this petition. App. 89-108.

[6] *See Brown & Sharpe Mfg. Co.*, 299 N.L.R.B. 586, 586-87 (1990).

steering committee documents did not amount to "operative facts" under *Ducane*. The union sought review. In its first decision, the court of appeals affirmed the *Ducane* rule and approved its retroactive application to this case, but found that the board's treatment of the fraudulent concealment exception was "not a reasoned application of any intelligible standard."[7] The court therefore remanded the case to the board to explain its application of the fraudulent concealment exception.

On remand the board issued its second decision.[8] This time the board abandoned its use of the *Ducane* phrase "operative facts," but dismissed the charges anyway, on a purported application of the "material facts" standard from the court of appeal's opinion in *Fitzgerald v. Seamans*, 553 F.2d 220 (D.C. Cir. 1977). On the union's request for review the court of appeals found that the board had again failed to articulate an intelligible standard, and also found that the result reached by the board was inconsistent with the purpose of tolling a limitations period.[9] Refusing to give the board a third try, the court itself then applied the *Fitzgerald* materiality standard: the court of appeals held that the evidence was sufficient to withstand a motion to dismiss the charges and thus was "material" under the *Ducane* rule. The court once again remanded the case to the board and instructed it to

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[7] *See District Lodge 64, International Ass'n of Machinists and Aerospace Workers v. NLRB*, 949 F.2d 441, 445-46, 449-50 (D.C. Cir. 1991).

[8] *See Brown & Sharpe Mfg. Co.*, 312 N.L.R.B. 444 (1993).

[9] *See District Lodge 64, IAMAW v. NLRB*, 50 F.3d at 1094-95.

consider whether that evidence had been fraudulently concealed.

On a 2-1 vote the board found that the company had not fraudulently concealed the material evidence.[10] Once again purporting to apply the *Fitzgerald* standard and to follow the equitable tolling doctrine set out in *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946), the board concluded that the company did not engage in any affirmative act of concealment, and found (without considering either Waterman's evidence or the steering committee documents) no word or act by the company designed to suppress the truth from the General Counsel. The majority reasoned that a respondent in an unfair labor practice investigation is under no obligation to cooperate with the General Counsel in the investigation, but did not consider whether a respondent's election to cooperate gave rise to a duty of disclosure. While the majority stated that a finding of fraudulent concealment would be appropriate if a respondent affirmatively represented (falsely) that it was providing all relevant material, the majority did not consider whether such a finding is warranted where the respondent creates that impression by a false appearance of full cooperation.

Board Chairman Gould dissented, concluding that the company had engaged in fraudulent concealment. According to Chairman Gould, fraudulent concealment occurred by virtue of the company's deliberate withholding of the steering committee documents. The company gave the appearance of full cooperation with the General

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[10] *See Brown & Sharpe Mfg. Co.*, 321 N.L.R.B. 924 (1996).

Counsel during the investigation and provided the General Counsel with many witnesses and documents relevant to the charges. But the company was also in possession of a "smoking gun" and was the only party who was aware of its existence. When the company affirmatively chose to withhold that information while giving the General Counsel the impression that it was fully cooperating with the investigation, an affirmative act of concealment took place. The result of the company's partial cooperation under the guise of full cooperation was, according to Chairman Gould, that the General Counsel was effectively lulled into believing that no material evidence was being withheld by the company.

The union once again appealed the board's decision and order to the court of appeals. On December 12, 1997, the court denied the union's petition for review.[11] Applying a deferential standard of review, the court approved the board's adoption of the affirmative-act-of-concealment test based on *Fitzgerald*. Although the board had failed to consider the company's representations to the investigator in light of the Waterman revelations and the steering committee documents, the court of appeals did not take issue with the board's factual determination that the company engaged in no affirmative act. In spite of the company's repeated representations to the investigator that the "absolutes" were essential to its continued viability and its failure to mention or disclose the steering

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[11] *See District Lodge 64, Intern. Ass'n of Machinists and Aerospace Workers, AFL-CIO v. NLRB*, 130 F.3d 1083 (D.C. Cir. 1997).

committee documents (which bared the lie in the company's representations), the court of appeals dismissed Chairman Gould's dissent, observing that "[t]he problem here is not one of partial cooperation, but the investigator's failure to ask the Company either for details about the steering committee or for a blanket disclosure of all documents relating to the preparation of the Company's collective bargaining proposals." Thus, because the board's own investigator was duped by the company's misrepresentations into not asking the right questions, the company had no duty to disclose, and its failure to disclose did not amount to fraudulent concealment.

REASONS FOR GRANTING THE WRIT

A. The Board Must Interpret And Apply Equitable Tolling Provisions Of Borrowed Federal Statutes Of Limitation Consistent With Relevant Decisions Of Federal Courts.

In *Ducane Heating Corp.* the board borrowed the six-month limitations period of § 10(b) of the Act to limit the General Counsel's authority to reinstate dismissed charges under § 3(d). The board expressly qualified the limitations period with a tolling provision. 273 N.L.R.B. at 1390 (6-month limitation period applies "absent special circumstances in which a [charged party] fraudulently conceals the operative facts underlying the alleged violation"). Because Congress did not specify a period of limitations for § 3(d) reinstatement of charges, the board's recognition of a tolling provision was consistent with federal common law: such provisions are implied. *See*

Holmberg v. Armbrecht, 327 U.S. 392, 395, 66 S. Ct. 582, 584 (1946). Given that source for the tolling provision accompanying the limitations period in *Ducane*, the board cannot interpret and apply it in a way that is inconsistent with relevant precedents of federal courts. *See, e.g., DelCostello v. Teamsters*, 462 U.S. 151, 158-60, 103 S. Ct. 2281, 2287-88 (1983). The board's rejection in its second decision in this case of "the glosses on the fraudulent concealment doctrine set forth by various Federal courts" is thus erroneous and without effect.

The board's power to forge and apply equitable tolling provisions that are inconsistent with the decisions of federal courts is not improved by the board's competence to determine national labor policy and its interest in promoting cooperative investigations. The board has other means within its discretion to achieve its policies. *Cf. In re Sealed Case*, 676 F.2d 793, 822-24 (D.C. Cir. 1982) (SEC voluntary disclosure program).

Despite the board's obligation to apply equitable tolling consistent with relevant decisions of the federal courts, both the board and the court of appeals have proceeded below as if governed by this Court's decision in *Chevron USA v. NRDC*, 467 U.S. 837, 842, 104 S. Ct. 2778, 2781 (1984), which requires deference to the reasonable decision-making of a federal agency. *See, e.g., District Lodge 64, IAMAW v. NLRB*, 949 F.2d at 444-46 (upholding *Ducane*). The board here declared its freedom to depart from federal tolling law in pursuit of its policies, and, having declared its freedom to do so, the board did exactly what it said it could. The court of appeals then erroneously deferred to the board's analysis.

While this case is factually *sui generis*, the issue of the board's obligation to apply federal precedent is likely to recur in this and other regulatory contexts until clarified. Accordingly, a *Writ of Certiorari* should issue to correct the decisions of the Courts of Appeals and to clarify for the board that it must interpret and apply tolling provisions of borrowed federal statutes of limitations consistent with relevant decisions of federal courts.

B. Where Equitable Tolling Applies Due To Fraudulent Concealment, Federal Courts Recognize And Should Apply The Principle That A Charged Party Who Elects To Cooperate In An Investigation And Who Volunteers Favorable Information Has A Duty To Disclose Any Additional Material Information Necessary To Prevent The Investigator From Being Misled By The Selective Disclosures Of Favorable Information.

The purpose of equitable tolling is to prevent persons from taking advantage of their own wrongs by concealing potentially valid claims and then, when the claims are discovered, seeking dismissal of the heretofore concealed claims behind the shelter of the statute of limitations. This purpose was entirely defeated by the tolling standard applied by the board in this case and approved by the court of appeals. Under the standard applied by the board, persons who elect to cooperate in an investigation into charges against them, and who voluntarily disclose information aimed at convincing the investigator that the charges should be dismissed, have no duty to avoid selective disclosures of favorable information. Under the standard applied here such persons are free to withhold

deliberately any unfavorable material that they can lull the investigator into believing does not exist. Under this standard, the statute of limitations for fraudulent concealment is tolled only where a charged party affirmatively lies to an investigator in response to a direct question or request for information. More common (and myriad) forms of trick, artifice, and contrivance by which an investigator may be misled or deceived are thus entirely outside the scope of the board's narrow view of fraudulent concealment. Thus, here the company – the charged party – gave the General Counsel's investigator the appearance (false though it was) of full cooperation while deliberately withholding material evidence. The company thus effectively lulled the investigator into believing that no material evidence was being withheld. In the face of the company's ruse, the board found, consistent with its narrow standard, that there was "no evidence of 'any word or act' that was designed to suppress the truth from the General Counsel."

This conclusion was actually constructed by the ALJ on an erroneous legal foundation. In 1986 the ALJ determined, on the basis of the board's decision in *Ducane*, that the limitations period could not be tolled simply on the belated discovery of new evidence revealing that the explanation that the company gave to the General Counsel's investigator for its allegedly unlawful activity might have been untrue. Thus, in spite of the fact that the discovery of the company's steering committee documents had revealed that the company had been less than forthcoming in its cooperation (false) with the investigator, the ALJ found no proof of fraudulent concealment

such as would toll the limitations period because "important questions were never asked [by the General Counsel's investigator] and the pertinent information was never demanded." The absence of such demands, the ALJ reasoned, obviated "misstatement" and left only a situation where the company failed to disclose the existence of documents "which might have contradicted the bona fides" of the company's dismissal-winning explanation. Concluding that the company had no duty at all to reveal anything to the General Counsel during the investigation,[12] the ALJ determined that the company's non-disclosure of steering committee documents did not amount to fraudulent concealment.

The linchpin of the ALJ's analysis was the fact that the investigator negligently failed to demand the company's steering committee documents. Without such a demand, reasoned the ALJ, the company was under no duty to disclose those documents. This analysis was adopted by the board nearly a decade later when it concluded that there was no evidence of fraudulent concealment. Without examining the legal foundation, the court of appeals upheld the result as well.[13]

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[12] "[T]he General Counsel and the Union cited many decisions supporting their view that somehow [the company] had a duty to reveal the existence of the [steering committee] minutes and position papers. I found none of them helpful. Rather, there has been no showing whatsoever that [the company] had a duty to reveal anything." App. 106-07.

[13] The court dismissed the main point of Chairman Gould's dissent from the board – that the company was obliged to be forthcoming by agreeing to cooperate in the investigation – by focusing, as did the board and the ALJ, exclusively on the

In deferring to the board's acceptance of the ALJ's reasoning, the court of appeals erroneously approved a narrow concept of fraudulent concealment and equitable tolling which is inconsistent with the decisions of other circuit courts of appeals. *See, e.g., Baskin v. Hawley*, 807 F.2d 1120, 1132 (2d Cir. 1986) (principle is plainly applicable to determine fraudulent concealment for tolling statute of limitations that selective disclosure of favorable information which omits all references to unfavorable material facts breaches duty of disclosure of person who speaks, but otherwise has no duty to disclose anything); *cf. Milton v. Van Dorn Co.*, 961 F.2d 965, 968, n.4 (1st Cir. 1992) (recognizing principle that voluntary disclosures imply corollary duty to refrain from incomplete, inaccurate, or misleading disclosures); *see also Ellis v. Zuck*, 409 F. Supp. 1151, 1158 (N.D. Ala. 1976) (applying Alabama law). These authorities undoubtedly state the better principle. The cat-and-mouse deception encouraged by the board's alternative is repugnant to a system which relies on voluntary full and fair disclosures to protect the rights of charging parties.

While, as noted, no deference is due in this instance to the board's reluctance to establish a policy which chills voluntary cooperation with board investigations, a finding of fraudulent concealment in this factually *sui generis*

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negligent conduct of the General Counsel's investigator: "[t]he problem here is not one of partial cooperation, but the investigator's failure to ask the company either for details about the steering committee or for a blanket disclosure of all documents relating to the preparation of [the company's] collective bargaining proposals." *District Lodge 64, IAMAW*, 130 F.3d at 1087, n.1.

case does not threaten the board's concerns. As noted by Chairman Gould, this is a smoking-gun case, not one involving either mere silence or innocent or negligent non-disclosure. It would be a disservice to all to pretend that petitioners, respondents, the General Counsel, and the board are incapable of distinguishing innocent (even negligent) non-disclosures from deliberately misleading non-disclosures. This is a case of the latter. The company's voluntary representations and production of documents designed to convince the General Counsel's investigator to dismiss the charges against it deliberately concealed a smoking gun. By no reasonable measure in light of the above-noted authorities does it follow from the company's voluntary representations during the course of the investigation that the disclosure of the steering committee notes was not required to complete the picture painted by the company. The company had a duty to speak and breached it. Accordingly, its non-disclosure of the steering committee documents constituted fraudulent concealment.

C. The Court Of Appeals Erroneously Deferred To The Board's Determination That The Company Engaged In No Affirmative Act Of Concealment Because The Court Overlooked The Fact That, Contrary To The Direction Provided In Its Prior Decision, The Board Neglected To Consider Critical Material Evidence On The Question Of Fraudulent Concealment.

The court of appeals determined in its second decision that the company withheld material evidence from the General Counsel's investigator which "clearly support[ed] the Union's surface bargaining allegation."

While the board found that the company cooperated in the investigation and voluntarily disclosed evidence when requested, the court of appeals qualified these findings by noting in its second opinion that the company, while purporting to cooperate voluntarily in the investigation, made representations that "might have been untrue." As the ALJ had previously determined that these voluntary efforts were calculated to convince the board's investigator that it did nothing wrong and, more specifically, that it bargained in good faith, the statements were clearly calculated to mislead. Thus, the court of appeals acknowledged in its third decision that the General Counsel's investigator "thought that there had been 'a form of concealment' by the company."

In spite of these clear indications of misrepresentation, the board applied a strict affirmative-act requirement and concluded that there was no evidence that the company had engaged in fraudulent concealment. Reaching this conclusion, however, the board somehow overlooked the most critical facts. First, it disregarded Waterman's testimony that the company fired him for refusing to engage in surface bargaining (a fact which indicates that the company's efforts to persuade the investigator otherwise were false). Second, the board did not even acknowledge the steering committee's documents (which indicated that the company had misrepresented its "absolutes" during the negotiations and investigation).

While the court of appeals clearly signalled to the board in its second opinion that it was to consider those facts in determining whether the company had engaged in fraudulent concealment, the board ignored them. In

spite of this material oversight, the court of appeals described the board's ultimate finding that the record disclosed no affirmative act of concealment as "unassailable."

The board clearly neglected to consider the most important material evidence supporting the union's claim that the limitations period should have tolled because the company fraudulently concealed evidence. The court of appeals erroneously deferred to the board's determination that the company engaged in no affirmative act of concealment. Those facts are unassailable.

D. Where Reasonably Possible, The Board Must Take Affirmative Steps To Avoid The Extinction Of Rights Under The Act Which May Be Caused By Its Own Acts Of Negligence.

The tolerance of the court of appeals and the board for the extinction of the union's rights under the Act is manifestly unjust.[14] There are a number of ways in which the board might have avoided visiting the consequences of its own misfeasance on the union in this case. It may have taken a more expansive view of equitable tolling[15] or considered that by most measures (including its own decisions) this was a fraudulent concealment case. The board could have rejected the fixed-limitations approach of *Ducane* and adopted a laches doctrine for reinstatement

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[14] *See District Lodge 64, IAMAW v. NLRB*, 50 F.3d at 1088.

[15] *See, e.g., Volk v. Multi-Media, Inc.*, 516 F. Supp. 157, 161-62 (S.D. Ohio 1981) (180-day ADEA notice period equitably tolled because of sloppy, inept practice of plaintiff's attorney).

of dismissed charges. The board might also have refrained from applying *Ducane* in this factually *sui generis* case. *See, e.g., Inland Lakes Management, Inc. v. NLRB*, 987 F.2d 799, 805 (D.C. Cir. 1993) (citing *Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade*, 412 U.S. 800, 808, 93 S. Ct. 2367, 2375 (1973) (plurality opinion)).

This case shows ample cause for the necessity of revisiting the principle, generally established in decisions of the Court,[16] that the consequences of the board's misfeasance should not be visited on innocent parties.

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[16] *See NLRB v. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 266, 90 S. Ct. 417, 421 (1969).

CONCLUSION

For the reasons set forth above, petitioners respectfully request that this Court issue a *Writ of Certiorari* to the United States Court of Appeals for the District of Columbia Circuit, and review and vacate the judgment entered in that court, and thereafter remand the matter to the National Labor Relations Board for further proceedings.

Respectfully submitted,

LAUREN E. JONES
Counsel of Record
MICHAEL T. ESKEY
JONES ASSOCIATES
72 South Main Street
Providence, RI 02903
(401) 274-4446

MARC B. GURSKY
GURSKY LAW ASSOCIATES
10 Davol Square
Providence, RI 02903
(401) 454-7400

ALLISON BECK
General Counsel
2000 Machinists Place
Upper Marlboro, MD 20772-2867
(301) 967-5400

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 24, 1997 Decided December 12, 1997

No. 97-1026

INTERNATIONAL ASSOCIATION OF MACHINISTS
& AEROSPACE WORKERS, AFL-CIO,
DISTRICT LODGE 64, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

BROWN & SHARPE MANUFACTURING COMPANY, INTERVENOR

On Petition for Review of an Order of the
National Labor Relations Board

Marc B. Gursky argued the cause and filed the briefs for petitioners.

Frederick C. Havard, Supervisory Attorney, National Labor Relations Board, argued the cause for respondent, with whom *Linda R. Sher*, Associate General Counsel, and *Aileen A. Armstrong*, Deputy Associate General Counsel, were on the brief.

Thomas C. Keeney argued the cause for intervenor Brown & Sharpe Manufacturing Company, with whom *William R. Powers, III* was on the brief.

Before: GINSBURG, ROGERS and TATEL, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* ROGERS.

ROGERS, *Circuit Judge*: The parties are before the court for the third time as a result of a labor dispute that began over sixteen years ago. In 1981, petitioners District Lodge 64 of the International Association of Machinists and Aerospace Workers, AFL-CIO, and its Local Lodges 883, 1088, and 1142 (hereinafter "IAM" or "the union") filed a series of charges with the National Labor Relations Board ("the Board") alleging bad faith bargaining by Brown & Sharpe Manufacturing Co. ("Brown & Sharpe" or "the company"). The General Counsel of the Board dismissed the charges and refused to issue an unfair labor practice complaint, but later attempted to reinstate the charges on the basis of newly discovered evidence uncovered during the investigation of a separate unfair labor practice charge filed by the union against Brown & Sharpe.

To date, this litigation has concerned only a preliminary procedural issue: whether the General Counsel's attempt to reinstate the dismissed charges was valid under the Board's precedent. In *Ducane Heating Corp.*, 273 N.L.R.B. 1389 (1985), the Board announced that the General Counsel could not reinstate a dismissed charge more than six months after the alleged unfair labor practice occurred "absent special circumstances in which a respondent fraudulently conceals the operative facts underlying the alleged violation." *Id.* at 1390. After one decision by an administrative law judge ("ALJ"), two by the court, and three by the Board, it is settled that the evidence belatedly discovered by the General Counsel was material; the issue now is whether Brown & Sharpe fraudulently concealed that evidence. The Board ruled that the company did not engage in fraudulent concealment, and hence that the General Counsel could not

reinstate IAM's dismissed charges. We deny the petition for review.

I.

IAM's charges centered around the assertion that Brown & Sharpe engaged in illegal "surface bargaining." *See International Ass'n of Machinists & Aerospace Workers v. NLRB*, 50 F.3d 1088, 1090 (D.C. Cir. 1995). Specifically, IAM claimed and continues to claim that the company had no good faith intention of reaching agreement with the union in a contract negotiation that began on September 4, 1981. In that negotiation, Brown & Sharpe insisted that its positions on two issues – "job preference" (also known as "machine seniority") and "mandatory transfers" – were "absolutes," not open to modification. IAM sought a hearing before the Board to show that Brown & Sharpe's refusal to compromise on these issues was based not on any legitimate business reason, but rather on the company's improper desire to manufacture a bargaining impasse.

Whatever the company's intent, in fact, the sides could not reach agreement on these two key issues and others, and on October 18, 1981, the members of IAM went on strike. Shortly thereafter, on November 5, 1981, and March 18, 1982, IAM filed timely unfair labor practice charges against Brown & Sharpe for bargaining with no good faith intention of trying to reach agreement, in violation of sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act ("the Act"), 29 U.S.C. § 158(a)(1), (5) (1988). *See Int'l Ass'n of Machinists*, 50 F.3d at 1090. Brown & Sharpe appeared to cooperate fully with the General

Counsel's subsequent investigation of the matter. In a meeting with an investigator from the General Counsel's office, representatives of Brown & Sharpe explained the nature of the company's "absolutes," and, at the request of the investigator, provided certain documents: notes taken during negotiating sessions, correspondence between the parties, and the various proposals made. The investigator had also been previously informed by the union about the existence of a steering committee that oversaw Brown & Sharpe's bargaining strategy. In an omission that would prove crucial, however, he did not ask Brown & Sharpe's representatives about the steering committee or request documents it had produced. Thereafter, the General Counsel dismissed IAM's charges and declined to issue a complaint. Without such a complaint, of course, the Board would not hold a hearing on IAM's charges. *See* 29 U.S.C. § 160(b) (1988).

Seven months later, on July 30, 1982, a former manager of Brown & Sharpe sued the company for wrongful discharge, claiming that he had been fired for his refusal to engage in surface bargaining. *See Int'l Ass'n of Machinists*, 50 F.3d at 1090. As a result, IAM filed a new unfair labor practice charge, and the General Counsel subsequently learned of new evidence that appeared to bolster the union's earlier claims of surface bargaining. This evidence consisted of documents produced by Brown & Sharpe's steering committee that implied that the company's positions on job preference and mandatory transfer may not have been as absolute as Brown & Sharpe had represented them to be during negotiations. *See id.* at 1091. In light of the new evidence, the General Counsel reinstated the previously dismissed unfair labor practice

charges and issued an unfair labor practice complaint that included these charges. *See id.*

Brown & Sharpe denied the charge of surface bargaining and also claimed that the General Counsel's complaint included dismissed claims improperly reinstated after a time bar came into effect. Section 10(b) of the Act provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." 29 U.S.C. § 160(b). As a corollary, the *Ducane* rule forbids the General Counsel from reinstating dismissed charges once those six months have passed, even if the charges were timely when filed, absent fraudulent concealment of evidence by the charged party. *See Ducane Heating Corp.*, 273 N.L.R.B. at 1390. Applying *Ducane*, an ALJ found that Brown & Sharpe had not fraudulently concealed the steering committee documents that led the General Counsel to reinstate the dismissed charges, and therefore ruled that those portions of the complaint based on the reinstated charges were invalid.

The Board affirmed the ALJ's decision, but on a different ground. The Board found that regardless of whether Brown & Sharpe had fraudulently concealed the steering committee documents, this evidence did not constitute "operative facts" relevant to the violation and consequently would not support reinstatement of the charges under the *Ducane* rule. *See Brown & Sharpe Mfg. Co.*, 299 N.L.R.B. 586, 586-87 (1990). On review, the court upheld the *Ducane* rule, and its retroactive application, but remanded the case to the Board for further explanation of the standard by which to determine whether the evidence constituted "operative facts." *See District Lodge*

64, *International Ass'n of Machinists v. NLRB*, 949 F.2d 441, 445-46, 449-50 (D.C. Cir. 1991).

On remand, the Board withdrew its use of the term "operative facts" and purported instead to apply the standard of "material facts" from this court's opinion in *Fitzgerald v. Seamans*, 553 F.2d 220 (D.C. Cir. 1977). *See id.* at 228; *Brown & Sharpe Mfg. Co.*, 312 N.L.R.B. 444, 444 (1993). Stating that it did "not necessarily adopt all the glosses on the fraudulent concealment doctrine set forth by various Federal courts," the Board reserved the opportunity to diverge from this court's precedents in the future. *Id.* at 444 n. 5. But in explaining why the evidence in the instant case did not satisfy the *Fitzgerald* standard of materiality, the Board reasoned that:

> concealed evidence is "material" if it would make a critical difference between establishing a violation and not doing so. Thus, if the absence of that evidence results in the dismissal or withdrawal of the charge, the subsequent discovery of that evidence will permit the resurrection of the charge. . . .

Id. at 445. On review of the Board's second order, the court rejected this purported application of circuit law on the ground that the Board's explanation of the standard was internally inconsistent: the first sentence requires a "critical difference," yet the second states that a lesser showing would be sufficient. *See International Ass'n of Machinists*, 50 F.3d at 1093. The court, viewing the second definition within this passage to be an accurate statement of the materiality test, held that because the steering committee documents could reasonably have prevented dismissal of IAM's charges by the General Counsel, the

evidence was material. *See id.* at 1094-95. The court then remanded the case to the Board for a determination of whether in fact Brown & Sharpe had fraudulently concealed the evidence. *See id.* at 1095.

In the order on review, the Board reaffirmed the ALJ's decision that the General Counsel's reinstatement of the dismissed charges was improper. This time, the Board joined the ALJ in finding that there was no fraudulent concealment. Again purporting to apply this circuit's precedents, the Board ruled that no finding of fraudulent concealment was possible without a showing of an affirmative act of concealment by Brown & Sharpe. *See Brown & Sharpe Mfg. Co.*, 321 N.L.R.B. 924, 924 (1996). Neither the company's professions of innocence nor its partial cooperation with the investigation constituted an affirmative act of concealment, and although Brown & Sharpe could have divulged the existence of the steering committee documents without a specific request by the General Counsel investigator, it was under no duty to do so. *See id.* at 924-25. Thus, the *Ducane* rule barred reinstatement of the dismissed charges and those portions of the unfair labor practice complaint were invalid. *See id.*

II.

IAM petitions for review of the Board's decision that there was no fraudulent concealment. The court will set aside the Board's decisions when they are arbitrary or they otherwise err in applying established law to the facts. *See Allegheny Ludlum Corp. v. NLRB*, 104 F.3d 1354, 1358 (D.C. Cir. 1997). The Board's findings of fact are final

if supported by substantial evidence in the record considered as a whole. *See* 29 U.S.C. § 160(e) (1988). Also, the court will uphold the Board's interpretation of the Act if it is an "acceptable reading of the statutory language and a reasonable implementation of the purposes of the relevant statutory sections." *NLRB v. International Ass'n of Bridge, Structural & Ornamental Iron Workers*, 434 U.S. 335, 341 (1978); *see also Inland Lakes Management, Inc. v. NLRB*, 987 F.2d 799, 805 (D.C. Cir. 1993).

In choosing a standard for determining what is necessary to show fraudulent concealment, and thus for application of the tolling exception to the *Ducane* rule, the Board chose to adopt this court's precedent. Specifically, the Board adopted the three-pronged test established in *Fitzgerald*. Under that test, fraudulent concealment tolls a statute of limitations when (1) there has been "deliberate concealment" of (2) "material facts" relating to the alleged wrongdoing and (3) the wronged party does not know of those facts and could not have discovered them through "reasonable diligence." *Fitzgerald*, 553 F.2d at 228. IAM's difficulty centers on the first prong of the test: without showing that Brown & Sharpe concealed any evidence, IAM cannot invoke this equitable doctrine. The Board ruled that in order to show fraudulent concealment, IAM had to show an affirmative act of concealment. *See Brown & Sharpe Mfg. Co.*, 321 N.L.R.B. at 924 (citing *Richards v. Mileski*, 662 F.2d 65, 70 (D.C. Cir. 1981)). While not contending that the Board adopted an erroneous legal standard for fraudulent concealment, IAM maintains that the Board misconstrued and misapplied this court's precedent when it found that Brown & Sharpe had not fraudulently concealed the steering committee

documents. We find no basis to overturn the Board's legal decision that an affirmative act of concealment was necessary to trigger the exception in the *Ducane* rule. Nor do we find any basis on which to overturn the Board's factual determination in applying this rule that there was no such act.

Although IAM contends that Brown & Sharpe deliberately misled the investigator into believing that the company had given full cooperation, IAM can identify no instances in which Brown & Sharpe affirmatively lied, nor do any such instances appear in the record. The crux of IAM's argument is that merely by cooperating with the General Counsel's investigation without divulging all of the information it knew to be relevant, Brown & Sharpe performed an affirmative act of concealment.[1] The Board ruled otherwise, finding that Brown & Sharpe did not intend its participation as a ruse to prevent the Board from finding the steering committee position papers and

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[1] In dissent, Chairman Gould took the position that no cooperation at all would be better than partial cooperation for the purposes of investigation. *See Brown & Sharpe Mfg. Co.*, 321 N.L.R.B. at 925 (Gould, C., dissenting). In his view, by agreeing to cooperate, the company was obligated to be forthcoming; therefore, once the General Counsel asked about the concept of "absolutes," the company was on notice that the steering committee minutes were material and its partial cooperation with the investigator lulled the General Counsel into believing that no material evidence was being withheld. *See id.* at 925-26. The problem here is not one of partial cooperation, but the investigator's failure to ask the company either for details about the steering committee or for a blanket disclosure of all documents relating to the preparation of Brown & Sharpe's collective bargaining proposals.

noting that the ALJ had found that "important questions were never asked and pertinent information was never demanded," and, further, that when asked for the papers during a subsequent investigation, the company had promptly turned them over. *Brown & Sharpe Mfg. Co.*, 321 N.L.R.B. at 924. This factual determination is final if supported by substantial evidence in the record, *see* 29 U.S.C. § 160(e), notwithstanding other possible interpretations of the evidence. *See Secretary of Labor, Mine Safety & Health Admin. v. Federal Mine Safety & Health Review Comm'n*, 111 F.3d 913, 918 (D.C. Cir. 1997). There is little question that it has such support. Most telling is the fact that if Brown & Sharpe had intended its participation as a ruse to distract the investigator from the steering committee documents, it seems doubtful that it would have acknowledged the existence of the steering committee at all.

IAM mentions one other possible affirmative act of concealment by Brown & Sharpe: even if Brown & Sharpe did not intend its participation in the investigation to mislead the Board, if in the course of that investigation Brown & Sharpe affirmatively went out of its way to express the firmness of its "absolutes," that potentially could constitute fraudulent concealment. Here, IAM focuses on the testimony of the General Counsel's investigator that in view of the company's firm position on the "absolutes," he believed that management had been virtually unanimous in its position, but that after reading the steering committee minutes indicating dissension among management, he thought that there had been "a form of concealment" by the company. There was substantial evidence in the record to support the Board's

finding that Brown & Sharpe did not go out of its way to mask the dissension, however. Indeed, the General Counsel's investigator testified that it was not his usual practice to ask companies for documents showing how they arrived at their bargaining positions.[2]

For these reasons, we conclude that the Board's factual determination that there was no affirmative act of fraudulent concealment by the company is as unassailable as its legal determination that there had to be such an act to support reinstatement of the dismissed charges under the *Ducane* rule. At the same time, we acknowledge that fault for the delay in discovering the steering committee documents seems to lie not with the union, which had told the investigator about the existence of the steering committee, but with the General Counsel's office. Its investigator could have asked the company for the steering committee documents, as both the Board and the ALJ noted. Yet it is the union that must bear the brunt of this failure, and of any unfair labor practice that the company may have committed but cannot be proven. However, as the court observed in reviewing the Board's first order, the consequence of a statutory scheme that empowers

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[2] Although IAM contends that under *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984), Brown & Sharpe's behavior may have constituted fraudulent concealment because it entailed "some minimum of culpability – if not affirmative concealment, then at least the construction of a scheme which is by its nature unknowable," *id.* at 34 (quoting *Long v. Abbott Mortgage Corp.*, 459 F. Supp. 108, 118 n.7 (D. Conn. 1978)) (internal quotation marks omitted), this argument was not presented to the Board and we therefore decline to consider it. *See Busse Broad. Corp. v. FCC*, 87 F.3d 1456, 1458, 1461-62 (D.C. Cir. 1996).

only the General Counsel to issue complaints is that some party must bear the risk of negligence on the part of the General Counsel's office: "Investigative foul-ups by the General Counsel necessarily burden one party or another (the charging party under *Ducane*, the charged party under its opposite); neither inequity is necessarily greater than the other, and it is within the Board's discretion to strike the balance as it has." *District Lodge 64*, 949 F.2d at 449. Accordingly, we deny the petition for review.

Brown & Sharpe Manufacturing Company *and* District Lodge 64, International Association of Machinists & Aerospace Workers, AFL-CIO, and its Local Lodges 883, 1088, and 1142 *and* Local No. 119, International Federation of Professional & Technical Engineers, AFL-CIO. Cases 1-CA-19224, 1-CA-19567, 1-CA-19690, 1-CA-19958, 1-CA-20283, 1-CA-20291, 1-CA-20304, 1-CA-21508, and 1-CA-21560

August 16, 1996

SECOND SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

This case is before us on remand from the United States Court of Appeals for the District of Columbia.[1] The court asked the Board to determine whether the material evidence at issue here was fraudulently concealed by the Respondent, an action that would toll the 10(b) period.

The issue of whether the material evidence in question was fraudulently concealed was addressed by Administrative Law Judge Benjamin Schlesinger in his decision dated April 5, 1989. He found that the evidence in question, specifically, the documents from the Respondent's steering committee in which the subject of bargaining "absolutes" was addressed, was not fraudulently concealed. The judge reasoned that because the General Counsel was aware of the existence of the steering committee and that the issue of "absolutes" constituted the core of the dispute, and failed to ask the Respondent for all documents related to the "absolutes" or the steering

[1] 50 F.3d 1088 (1995).

committee, the Respondent was under no obligation to produce the documents. The judge noted that there is no evidence that the Respondent committed any fraud. There was no misstatement, the judge found, because important questions were never asked and pertinent information was never demanded. Accordingly, he dismissed the allegations in the complaint related to the previously dismissed charges of bad-faith bargaining.

We agree with the judge that there has been no fraudulent concealment that would toll the 10(b) period in this case and require the reinstatement of the previously dismissed charges. In our Supplement Decision and Order,[2] we stated our agreement with the standard set forth by the D.C. Circuit in *Fitzgerald v. Seamans*,[3] describing the three critical elements of the equitable doctrine detailed in *Holmberg v. Armbrecht*[4] concerning the tolling of a limitations period. These elements are: (1) deliberate concealment has occurred; (2) material facts were the object of the concealment; and (3) the injured party was ignorant of those facts, without any fault or want of due diligence on its part. All three elements must be present to warrant the tolling of the 10(b) period. We find that the first element is missing here.[5]

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[2] 312 NLRB 444 (1993).

[3] 553 F.2d 220, 228 (D.C.Cir.1977).

[4] 327 U.S. 392, 397 (1946).

[5] In our Supplemental Decision and Order, the Board found that the evidence at issue here was not "material," and that therefore the tolling of the 10(b) period was not warranted. The D.C. Circuit reversed, finding that the evidence was material and remanding the case specifically on the issue of whether fraudulent concealment was present.

In order to find that there has been concealment, there must be "some positive act tending to conceal the cause of action from the plaintiff, although any word or act tending to suppress the truth is enough."[6] Here, the Respondent did not engage in any affirmative act of concealment. On the contrary, the Respondent voluntarily cooperated with the General Counsel's investigation of the unfair labor practice charges. It made available to the General Counsel several of its managers to answer questions and produced, as requested, bargaining notes, correspondence, proposals and counterproposals. When, during the course of a later investigation, the Respondent was asked for the evidence at issue, it produced that evidence without delay. There is no indication of "any word or act" that was designed to suppress the truth from the General Counsel.

Further, the fact that the Respondent attempted during the course of the investigation to convince the General Counsel that it had engaged in no wrongdoing is not an act of concealment. As the Board noted in *Winer Motors, Inc.*,[7] in most cases, a respondent denies the misconduct alleged or proffers an explanation, and the General Counsel must decide if the evidence presented in the investigation is sufficient to sustain the charging party's position. The denial of misconduct by the respondent is not dispositive of the charge, nor is it an act of concealment.

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[6] *Richards v. Mileski*, 662 F.2d 65, 70 (D.C. Cir. 1981) (citation omitted).

[7] 265 NLRB 1457, 1459 (1982).

Our dissenting colleague argues that the Respondent is guilty of fraudulent concealment because it did not, on its own initiative, produce an item that was not requested by the General Counsel. We believe that this view is impractical and would actually hinder the Board's investigatory process. As the judge stated, a respondent in an unfair labor practice investigation is under no obligation to cooperate with the General Counsel in the investigation of the unfair labor practice charges, and may choose to supply no information whatsoever, if it so desires. Establishing a policy that holds a respondent open to a later charge of fraudulent concealment if it does not disclose unrequested information that relates to the investigation of an unfair labor practice charge is counterproductive. Many respondents may understandably decide that cooperating with the General Counsel's investigation is too onerous, in which case the Board's Regional Offices will be forced to put forth the time and expense of securing an investigatory subpoena in order to determine whether to issue complaint.

In addition, such a policy would create a burden on a respondent to reveal, on its own initiative, material information that is potentially damaging to its defense. Where there is no affirmative act to mislead the General Counsel, a respondent should be permitted to present its defense to unfair labor practice charges during the investigation without being required to produce all the material information within its possession. Clearly, where the General Counsel requests or subpoenas certain information and a respondent falsely denies that such information exists, deliberate concealment can be found. A similar finding would be appropriate if a respondent

affirmatively represented that it was providing *all* relevant material, while actually withholding certain information. Neither is the situation here, however, and we will not find fraudulent concealment where a respondent is under no duty to disclose information and has engaged in no positive act of concealment. Accordingly, we dismiss the complaint.[8]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. August 16, 1996

Margaret A. Browning, Member

Charles I. Cohen, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN GOULD, dissenting.

Contrary to my colleagues, I would find that the Respondent has engaged in fraudulent concealment of material facts and would remand the case to the judge for a decision on the merits. In my view, all three critical

[8] Our dismissal in case 299 NLRB 586 (1990) of the 8(a)(5) allegations concerning the Respondent's failure to provide the Union with the names of strike replacements who had been terminated is not at issue here and is reaffirmed.

elements set forth in *Fitzgerald v. Seamans*[1] are present: (1) deliberate concealment has occurred; (2) material facts were the object of the concealment; and (3) the injured party was ignorant of those facts, without any fault or want of due diligence on its part. In its most recent decision in this case, the D.C. Circuit found that the evidence at issue constitutes "material facts" within the meaning of *Fitzgerald*, and remanded the case to the Board for a determination of whether the evidence, although material, was actually fraudulently concealed.

I would find that fraudulent concealment has occurred by virtue of the Respondent's deliberate withholding of the steering committee documents. The Respondent gave the appearance of full cooperation with the General Counsel during the course of the investigation, and provided the General Counsel with many witnesses and documents relevant to the charges. But the Respondent was also in possession of a "smoking gun," and was the only party who was aware of its existence. Although the General Counsel was aware that the Respondent had formed a steering committee, the General Counsel was not aware of its significance or the fact that it generated documents that were material to the allegations being investigated. That information rested solely with the Respondent, and when it chose to affirmatively withhold that information while giving the General Counsel the impression that it was fully cooperating with the rest of the investigation, an affirmative act of concealment took place.

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[1] 553 F.2d 220, 228 (D.C. Cir. 1977).

The majority finds no fraudulent concealment because they conclude that there was no obligation to provide the information to the General Counsel, and no affirmative act of concealment of the documents at issue. However, by agreeing to cooperate with the General Counsel, and by giving the impression of full cooperation, the Respondent has created an obligation to be forthcoming with the General Counsel. Once this obligation is created, then the deliberate withholding of material evidence is an affirmative act of concealment.

The majority further states that to require a respondent to come forward with material evidence that was not requested would hinder the General Counsel's ability to investigate charges because respondents would refuse to cooperate. This reasoning does the General Counsel a disservice. In the circumstances here, the General Counsel's investigation would have been better off with no cooperation from the Respondent than with partial cooperation given under the guise of full cooperation. The result of such partial cooperation was that the General Counsel was effectively lulled into believing that there was no material evidence being withheld,[2] and the charges were dismissed by the Region.

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[2] As noted by the D.C. Circuit in *Hobson v. Wilson*, "a defendant cannot avail himself of the bar of the statute of limitation, if it appears that he has done anything that would tend to lull the plaintiff into inaction." 737 F.2d 1, 37 fn. 113 (1984) (citing with approval *Hornblower v. George Washington Univ.*, 412 App. D.C. 64, 75 (1908) (quoted in *William J. Davis, Inc. v. Young*, 412 A.2d 1187, 1191-1192 (D.C. 1980)).

I would also find that the General Counsel exercised due diligence in the course of the investigation of the charges. The judge's decision implies that the General Counsel was at fault here for not asking for the steering committee documents. However, as noted above, the General Counsel was unaware that these documents existed, and was therefore unable to request them. The General Counsel did inquire during the course of the investigation about the steering committee and about the concept of "absolutes" at the bargaining table. This inquiry placed the Respondent on notice that any documents it had pertaining to "absolutes" would be material to the investigation, but the Respondent did not indicate that it had any documents relevant to these inquiries. The Respondent was the only party who knew of the existence of this documentary evidence, and was in a position where it should have come forward with that evidence. During the course of the investigation, the General Counsel was given many documents related to the case, but those pertaining to the development of the "absolutes" were notably missing. The General Counsel was given the impression that the Respondent was cooperating fully, and had no reason to suspect that additional material evidence existed. Accordingly, I would find that the General Counsel did exercise due diligence in the course of the investigation.

Because all three elements of the *Fitzgerald* standard are satisfied, I would find that the Respondent engaged in fraudulent concealment, that the dismissed charges should be reinstated, and that the case should be remanded to the judge for a decision on the merits.

Dated, Washington, D.C. August 16, 1996

William B. Gould IV, Chairman

NATIONAL LABOR RELATIONS BOARD

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 12, 1995 Decided April 7, 1995

No. 93-1767

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE 64, AFL-CIO, AND ITS LOCAL LODGES 883, 1088 AND 1142, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

BROWN & SHARPE MANUFACTURING COMPANY, INTERVENOR

On Petition for Review of an Order of the National Labor Relations Board

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Marc B. Gursky argued the cause for petitioner. With him on the briefs was *Mark D. Schneider.*

Frederick C. Havard, National Labor Relations Board, argued the cause for respondent. With him on the brief were *Linda R. Sher,* Acting Associate General Counsel, *Aileen A. Armstrong,* Deputy Associate General Counsel, and *Richard A. Cohen,* Attorney, National Labor Relations Board.

Thomas C. Keeney argued the cause for intervenor. With him on the brief was *William R. Powers, III.*

Before: EDWARDS, *Chief Judge,* BUCKLEY and TATEL, *Circuit Judges.*

Opinion for the Court filed by *Chief Judge* EDWARDS.

EDWARDS, *Chief Judge*: At issue in this case is the standard by which the National Labor Relations Board ("NLRB" or "Board") determines whether a previously dismissed unfair labor practice charge may be reinstated based on fraudulently concealed evidence discovered after the six-month limitations period has run under the National Labor Relations Act ("NLRA" or "Act"). We first addressed this case in *District Lodge 64, Int'l Ass'n of Machinists & Aerospace Workers v. NLRB*, 949 F.2d 441 (D.C. Cir. 1991). There, we upheld the Board's rule, first articulated in *Ducane Heating Corp.*, 273 N.L.R.B. 1389, 1390 (1985), *enforced without opinion*, 785 F.2d 304 (4th Cir. 1986), that "a dismissed charge may not be reinstated [by the Board's General Counsel] outside the 6-month limitations period of Section 10(b) absent special circumstances in which a respondent fraudulently conceals the operative facts underlying the alleged violation." We also upheld the Board's retroactive application of the *Ducane* rule to this case. *District Lodge 64*, 949 F.2d at 446-49. However, because we concluded that the Board failed to explain the "operative facts" standard under the *Ducane* rule, we remanded the case to the Board "for resolution of the fraudulent concealment issue." *Id.* at 449-50.

On remand, the Board abandoned the "operative facts" standard and ruled instead that allegedly concealed evidence must constitute "material facts" in order to toll the section 10(b) limitations period. *Brown & Sharpe Mfg. Co.*, 312 N.L.R.B. 444, 445 (1993) ("*Brown & Sharpe II*") (quoting *Fitzgerald v. Seamans*, 553 F.2d 220, 228 (D.C. Cir. 1977)). On the record before it, the Board held that evidence discovered by petitioner, District Lodge 64 of

the International Association of Machinists and Aerospace Workers, AFL-CIO, and its Local Lodges 883, 1088, and 1142 (collectively "Union"), following dismissal of its unfair labor practice charges against Brown & Sharpe Manufacturing Company ("Brown & Sharpe" or "Company") was insufficient to toll the section 10(b) limitations period, because that evidence, whether or not fraudulently concealed by the Company, did not constitute "material facts." *Id.* at 446. Because we find that the Board has failed to articulate an intelligible standard, and because the result reached by the Board reflects a miscomprehension of the purpose of "tolling" a limitations period, we grant the Union's petition for review and remand this case to the Board for further proceedings consistent with this opinion.

I. Background

A. *Factual Background*

Underlying this case is a dispute over whether Brown & Sharpe engaged in bad-faith bargaining with the Union during prolonged contract negotiations preceding a strike that began on October 18, 1981. At the time of these negotiations, the Union represented about 1600 workers at Brown & Sharpe's facility in Kingstown, R.I. Bargaining between the parties began on September 4, 1981, but failed to yield agreement on two key issues: (1) the prevailing practice of "job preference" or "machine seniority," under which employees could exercise their seniority to obtain an assignment to a specific job or machine in their group; and (2) "mandatory transfers," a provision in the previous collective bargaining agreement

prohibiting the Company from transferring employees without their consent.

After the employees went on strike on October 18, the Union filed timely unfair labor practice charges on November 5, 1981, and on March 18, 1982, alleging that Brown & Sharpe had failed to bargain in good faith in violation of sections 8(a)(1) and 8(a)(5) of the NLRA, 29 U.S.C. §§ 158(a)(1), 158(a)(5) (1988). The General Counsel subsequently dismissed all charges. On July 30, 1982, after final dismissal of the charges, the Union learned that David Waterman, the former Director of Industrial Relations at Brown & Sharpe, had sued the Company for wrongful discharge, claiming that he had been fired for refusing to commit unfair labor practices. Relying mainly on Waterman's allegations, the Union filed another charge on September 29, 1982, alleging that the Company had fired Waterman for refusing to pursue unlawful "surface bargaining," thus showing that the Company had never intended to bargain in good faith with the Union.

During investigation of the Union's charge concerning Waterman, the General Counsel learned of position papers that had been prepared for the Company's steering committee, a group that was created before contract negotiations began to assist in the formulation of the Company's bargaining strategy. The discovered position papers, as well as the minutes of steering committee meetings, revealed the thinking of certain Company officials with respect to potential contract proposals, including proposals relating to the two issues on which the parties had failed to reach agreement during negotiations. The papers and minutes allegedly bolstered the Union's surface bargaining theory by showing that the

Company viewed the job preference and mandatory transfer issues as less critical to management than the Company had represented to the Union during negotiations, during which it stated that its proposals in those areas were "absolutes" (*i.e.*, proposals without which the Company would not agree to any new contract). Based on these newly discovered documents, the General Counsel, on September 27, 1983, reinstated the Union's previously dismissed unfair labor practice charges. On December 7, 1983, the General Counsel issued a complaint that included the allegations based on the reinstated charges.

B. *The Board's Decision in Brown & Sharpe I and This Court's Decision in District Lodge 64*

When hearings began in 1984, Brown & Sharpe, in addition to denying the surface bargaining charge, moved to dismiss the portion of the complaint containing the reinstated charges on the ground that they had not been reinstated until after expiration of the section 10(b) limitations period. Section 10(b) requires parties to file an unfair labor practice charge with the Board within six months of the occurrence of the alleged violation.[1] The Administrative Law Judge ("ALJ") initially ruled that he would reserve judgment on the motion until after a full evidentiary hearing on the merits. While the Company's special appeal from that ruling was pending, the Board

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[1] Section 10(b) provides in relevant part: "[N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made. . . . " 29 U.S.C. § 160(b).

issued its decision in *Ducane,* which held that "a dismissed charge may not be reinstated [by the General Counsel] outside the 6-month limitations period of Section 10(b) absent special circumstances in which a respondent fraudulently conceals the operative facts underlying the alleged violation." 273 N.L.R.B. at 1390. As a result, the Board remanded the case to the ALJ for reconsideration in light of *Ducane* and ordered the General Counsel and the Union to show cause why the Company's motion to dismiss should not be granted.

In April 1986, the ALJ held that *Ducane* required dismissal of the surface bargaining charges because reinstatement had occurred long after the running of section 10(b)'s six-month period. The ALJ determined that, under *Ducane,* the limitations period could not be tolled based simply on the belated discovery of new evidence revealing that a respondent's explanation for its allegedly unlawful activity might have been untrue; rather, the Board required a respondent to have taken some affirmative act to fraudulently conceal operative facts. The ALJ then concluded that there was no evidence of such concealment by the Company, because the General Counsel had never requested the steering committee documents during the initial investigation of the case. *See Brown & Sharpe Mfg. Co.,* 299 N.L.R.B. 586, 593-96 (1990) ("*Brown & Sharpe I*") (reprinting ALJ decision).

The Board affirmed, but found it unnecessary to determine whether the Company's failure to produce the committee documents during the General Counsel's initial investigation constituted fraudulent concealment. *Id.* at 590 n.5. Instead, the Board found that, whether or not fraudulently concealed, the evidence did not constitute

"operative facts" because, "even viewing the evidence in a light most favorable to the General Counsel's position, it does not support a finding that the [Company] advanced proposals as genuine absolutes when it actually did not consider the proposals to be important to its operations." *Id.* at 587. Thus, the Board concluded that the committee documents "do[ ] not sufficiently support the charge of [surface bargaining] so as to warrant extending the [section] 10(b) limitations period." *Id.* at 586.

On the Union's petition for review, this court upheld the Board's *Ducane* rule as well as the Board's authority to apply the rule retroactively to this case. *District Lodge 64*, 949 F.2d at 444-49. We concluded, however, that the Board had not sufficiently explained its "operative facts" standard so as to give adequate guidance concerning "just how significant the [allegedly concealed] facts must be" to trigger the *Ducane* fraudulent concealment exception. *Id.* at 449. We explained:

> In considering federal statutes of limitations, we have said that "deliberate concealment of *material* facts" tolls the statute until the plaintiff discovers or with due diligence should have discovered the basis of the lawsuit. *Fitzgerald v. Seamans*, 553 F.2d 220, 228 (D.C. Cir. 1977) (emphasis added). Of course the Board may wish to use another standard, and may well be free to do so. But it does not explicitly embrace any standard, and we find it hard to relate the Board's implicit standard to the facts.

Id. We further stated that, as a summary judgment or failure-to-state-a-claim ruling, the Board's decision appeared deficient because the Board "d[id] not seem to

view the evidence in the light most favorable to the (hypothetical) non-moving party (the Union)" and because "the Board (without any apparent support) seemed to dismiss inferences that might have been significant." *Id.* at 450. Accordingly, we remanded the case to the Board "for resolution of the fraudulent concealment issue." *Id.*

C. *The Board's Decision in Brown & Sharpe II*

On remand, the Board adopted this court's standard for determining whether fraudulently concealed evidence warrants the tolling of a limitations period – namely, whether the concealed evidence constitutes "material facts." *Brown & Sharpe II*, 312 N.L.R.B. at 444 (quoting *Fitzgerald*, 553 F.2d at 228). The Board then explained its understanding of the term "material":

> [C]oncealed evidence is "material" if it would make a critical difference between establishing a violation and not doing so. Thus, if the absence of that evidence results in the dismissal or withdrawal of the charge, the subsequent discovery of that evidence will permit the resurrection of the charge, provided that the other two elements [of fraudulent concealment] are present. . . .

Id. at 445.[2]

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[2] The Board stated that fraudulent concealment "has three critical requirements: (1) deliberate concealment has occurred; (2) material facts were the object of the concealment; and (3) the injured party was ignorant of those facts, without any fault or want of due diligence on its part." *Brown & Sharpe II*, 312

In applying this standard, the Board found that the committee documents, considered as a whole, although "relevant to the charge of surface bargaining, . . . do not make a critical difference in establishing a violation . . . [and] therefore do not constitute material facts." *Id.* at 446. Because it concluded that the newly discovered evidence did not constitute material facts, the Board refused to reach the issue of whether the Company had fraudulently concealed the committee documents. Accordingly, the Board reaffirmed its earlier dismissal of the pertinent allegations of surface bargaining as being time-barred under section 10(b). The Union now petitions for review once again.

II. Analysis

A. *Introduction*

The Union contends that the NLRB in *Brown & Sharpe II* failed to articulate an intelligible standard by which the Board will determine whether allegedly concealed evidence is material for purposes of the *Ducane* rule. The Union also argues that the newly discovered evidence in this case is material under any rational construction of the term. We agree with the Union that the Board has again failed to articulate a coherent materiality standard for purposes of the *Ducane* rule. The Board purported to adopt this circuit's standard of materiality, but the rule

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N.L.R.B. at 444-45 (citing *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946); *Fitzgerald*, 553 F.2d at 228). Because the allegedly concealed evidence was held not material, the Board found it unnecessary to reach the other elements of fraudulent concealment. *Id.* at 445-46.

applied by the Board obviously miscomprehends our case law. Under this circuit's materiality standard – the standard adopted by the Board – the newly discovered evidence in this case is material.

B. *The Board's Materiality Standard and Its Application in This Case*

As noted above, the Board provided the following explanation of its materiality standard:

> [C]oncealed evidence is "material" if it would make a critical difference between establishing a violation and not doing so. Thus, if the absence of that evidence results in the dismissal or withdrawal of the charge, the subsequent discovery of that evidence will permit the resurrection of the charge. . . .

Brown & Sharpe II, 312 N.L.R.B. at 445. This standard makes no sense, however, because it is internally inconsistent. The Board's initial statement of its test – that "concealed evidence is 'material' if it would make a critical difference between establishing a violation and not doing so" – simply cannot be read consistently with its second articulation of the test – that "if the absence of that evidence results in the dismissal or withdrawal of the charge, the subsequent discovery of that evidence will permit the resurrection of the charge." The first statement of the test, which essentially requires that allegedly concealed evidence, to be material, be dispositive of the unfair labor practice claim, is a much higher standard than the second articulation of the test, which appears to require only evidence sufficient to defeat a motion to

dismiss the charge. These are two incompatible standards.

Even Board counsel, whose task it was to present and defend the Board's position to this court on petition for review, was unable to make sense of the Board's enunciated rule. In its brief to the court, the Board states that "[t]he question presented here is whether the committee documents that allegedly had been concealed could somehow have made a critical difference in the General Counsel's original decision to dismiss the unfair labor practice charge." Brief for the NLRB at 25-26. This restatement of the rule, however, could not possibly be the standard relied on by the Board, because it directly conflicts with the actual result reached by the Board. The General Counsel obviously thought that the newly discovered evidence made a "critical difference" in his original decision to dismiss the charge, for he sought to reinstate the charge based on that evidence. Thus, if the NLRB had actually applied the test asserted by counsel on review, it surely would have found that the newly discovered evidence was material and then moved to the question of whether the evidence was fraudulently concealed. Contrary to Board counsel's assertion, it appears that in applying its materiality "standard" to the facts of this case, the Board relied solely on the first part of its test. The Board found that, "although the [steering committee] documents may be relevant to the charge of surface bargaining, they do not make a critical difference in establishing a violation." *Brown & Sharpe II*, 312 N.L.R.B. at 446. Based on this finding, the Board determined that the documents "do not constitute material facts." *Id.*

If the Board indeed meant to require that allegedly concealed evidence must be dispositive of the unfair labor practice charge at issue, we conclude that this standard has at least two critical flaws. First, any standard requiring *dispositive* evidence to avoid the strictures of section 10(b) is contrary to the concept of "tolling," and is thus wrong as a matter of law. The purpose of tolling the limitations period is to allow consideration of the merits of claims that would otherwise be time-barred. *See, e.g., Hohri v. United States*, 782 F.2d 227, 246-53 (D.C. Cir. 1986) (remanding certain claims for trial on the merits after determining that defendant United States's fraudulent concealment of facts giving rise to cause of action tolled applicable statute of limitations), *vacated on other grounds*, 482 U.S. 64 (1987); *Hobson v. Wilson*, 737 F.2d 1, 32-42 (D.C. Cir. 1984) (holding that certain claims were properly tried to jury because defendants' fraudulent concealment tolled applicable limitations period), *cert. denied*, 470 U.S. 1084 (1985). Thus, by requiring a complainant to show that he or she can *prevail* on the merits in order to allow tolling for a hearing on the merits, the Board effectively nullifies the purpose of tolling.

Second, we find that, while the Board purported to adopt this circuit's standard for materiality in fraudulent concealment cases, the test applied by the Board here is cut from whole cloth, finding no support in our cases. Normally, we would not require the Board to apply any particular standard where, as here, the Board is making policy under an ambiguous provision of the NLRA. *See NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990) ("[T]he NLRB has the primary responsibility for developing and applying national labor policy.");

Exxel/Atmos, Inc. v. NLRB, 28 F.3d 1243, 1249 (D.C. Cir. 1994) ("It is up to the Board, not the courts, to make labor policy."). Here, however, the Board itself explicitly decided to adopt this court's standard in a particular context. In *District Lodge 64*, 949 F.2d at 449, we clearly stated that, while the Board on remand might consider using this circuit's standard for materiality in the fraudulent concealment context, "the Board may wish to use another standard, and may well be free to do so." Having chosen on remand to adopt our standard, *see Brown & Sharpe II*, 312 N.L.R.B. at 444 ("We agree with the *Fitzgerald* standard."), and thus having already exercised its policymaking authority, the Board was obliged to apply the applicable standard according to its terms.

The *second part* of the Board's standard is an accurate statement of the *materiality test* that they purported to adopt (but failed to apply):

> [I]f the absence of [the newly discovered] evidence results in the dismissal or withdrawal of the charge, the subsequent discovery of that evidence will permit resurrection of the charge. . . .

Id. at 445. Under this test of materiality, the standard is akin to that used when assessing pleadings on a motion to dismiss:

> "We do not provide for tolling simply because a plaintiff's ability to mount a successful case has been impaired in some degree. Instead, we provide for tolling only when concealment has so impaired the plaintiff's case that he is not able to survive a threshold motion to dismiss for

> failure to tender a claim that would advance beyond the pleading stage."

Id. at 445 n.25 (quoting *Hohri*, 782 F.2d at 249-50 n.57).[3]

As in the context of other federal statutes of limitation, this standard adequately protects against the introduction of stale evidence and respects the policy of repose underlying section 10(b). *See District Lodge 64*, 949 F.2d at 445 (discussing policy of repose contemplated by section 10(b)). Under this standard, newly discovered evidence, even though material, must still have been fraudulently concealed to toll the section 10(b) limitations period under *Ducane*. Furthermore, the mere fact that the General Counsel decides to reinstate previously dismissed charges based on allegedly concealed evidence, as occurred in this case, is not dispositive. The threshold of materiality is not that low. Rather, it remains the province of the Board to determine whether the General Counsel's decision to reinstate the charges at issue was reasonable in light of the delineated materiality standard.

Applying this standard to the facts at hand, it is clear that the allegedly concealed evidence in this case was sufficient to survive a motion to dismiss. Thus, the General Counsel's decision to reinstate the charges was reasonable. In reaching the contrary conclusion, the Board in *Brown & Sharpe II* relied exclusively on its previous findings in *Brown & Sharpe I*, and restated the core conclusion of *Brown & Sharpe I* that the evidence does "not support

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[3] The above-quoted statement in *Hohri* was an elaboration of our previous statement in *Hobson*, 737 F.2d at 35, that tolling is triggered by concealment of the "facts giving notice of the particular cause of action at issue."

the allegation that the [Company] engaged in surface bargaining." 312 N.L.R.B. at 446. In *District Lodge 64*, we rejected that conclusion, and our reasoning applies with equal force here:

> [E]ven assuming the claim ultimately to be completely meritless, the Board's analysis itself points to *some* evidence supportive of the claim. For example, the Board notes that "the position paper on [mandatory] transfers states that managers have had very few problems with them." This statement surely gives some support to the union view that treatment of mandatory transfers as an absolute was contrived, even if, on balance, a fact finder would conclude that the higher levels of Brown & Sharpe's management acted in good faith in rejecting the position paper's recommendation. Our inference that the Board was demanding a good deal more than "support" is reinforced by its remarks that particular pieces of evidence are not "inherently contradictory," seeming to suggest that only an inexplicable contradiction would be enough, regardless of whether the company offered an explanation.

949 F.2d at 450 (citations omitted).

Thus, the allegedly concealed evidence is sufficient to overcome a motion to dismiss, because the documents contain statements that certainly support a claim of surface bargaining. This is especially true when the affidavit of David Waterman, which the Board inexplicably ignored in both *Brown & Sharpe I* and *Brown & Sharpe II*, is taken into account. Waterman's affidavit suggests that Company management may have had no intention of

reaching agreement with the Union during contract negotiations, and that the machine seniority and mandatory transfer issues were created by the Company simply for purposes of forestalling agreement. *See* Affidavit of David Waterman, *reprinted in* Joint Appendix 293-311. That a fact finder might ultimately conclude that Waterman's testimony is not credible is irrelevant for purposes of a motion to dismiss, for that testimony must be viewed in the light most favorable to the General Counsel. The Board's view that, when read *as a whole*, the committee documents do not support the Union's claim, *see Brown & Sharpe II*, 312 N.L.R.B. at 446, is similarly irrelevant, because that evidence too must be read in the light most favorable to the General Counsel. In sum, because the combination of the newly discovered steering committee documents and the Waterman testimony clearly supports the Union's surface bargaining allegation, that evidence was sufficient to survive the Company's motion to dismiss and is thus material evidence for purposes of the *Ducane* rule.

We therefore vacate the judgment of the Board and remand the case for a determination of whether the evidence, though material, was actually fraudulently concealed by the Company. If the Board determines that the newly discovered evidence in this case was indeed fraudulently concealed, and thus that the section 10(b) limitations period is tolled, then the Board must reach the merits of the unfair labor practice charges.

III. Conclusion

For the foregoing reasons, the Union's petition for review is granted and the case remanded for further proceedings consistent with this opinion.

So ordered.

Brown & Sharpe Manufacturing Company *and* District Lodge 64, International Association of Machinists & Aerospace Workers, AFL-CIO, and its Local Lodges 883, 1088 and 1142 *and* Local No. 119, International Federation of Professional & Technical Engineers, AFL-CIO. Cases 1-CA-19224, 1-CA-19690, 1-CA-19958, 1-CA-20283, 1-CA-20291, 1-CA-20304, 1-CA-20508, 1-CA-21560, and 1-CA-19567

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

This case is on remand from the United States Court of Appeals for the District of Columbia. This court asked the Board to explain the standard that it applied to find that allegations of bad-faith bargaining in this case are time-barred under Section 10(b) of the Act.[1]

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[1] On August 28, 1990, the National Labor Relations Board issued its Decision and Order in this proceeding dismissing the complaint. See 299 NLRB 586. District Lodge 64, International Association of Machinists and Aerospace Workers, AFL-CIO and its Local Lodges 883, 1088 and 1142 filed with the D.C. Circuit a petition for review of the Board's Order.

In an opinion dated November 29, 1991, the court remanded the case to the Board. *District Lodge 64, International Association of Machinists and Aerospace Workers, AFL-CIO, and its Local Lodges 883, 1088, and 1142 v. NLRB*, No. 90-1503.

By letter dated February 19, 1992, the Board notified the parties that it had accepted the court's remand and that statements of position could be filed with respect to the issues raised by the remand. The General Counsel and the Respondent filed statements of position with the Board.

In the underlying proceeding, the General Counsel reinstated charges alleging bad-faith bargaining, which charges he had dismissed 2 years earlier. Relying on the discovery of documents concerning the Respondent's preparations for negotiations, the General Counsel contended that, under the rationale of *Ducane Heating Corp.*,[2] the Respondent's failure to disclose the documents amounted to a fraudulent concealment of operative facts warranting the tolling of the 10(b) limitations period. The Board rejected this contention. It reviewed the evidence allegedly concealed and concluded that the Respondent's failure to disclose the documents did not amount to a fraudulent concealment of "operative facts" under *Ducane*. On review, the court upheld the *Ducane* doctrine and its retroactive application to this case. However, the court held that the Board did not explicitly embrace any particular standard in finding that the documents did not amount to "operative facts" and left obscure how significant the evidence must be to constitute "operative facts" within the meaning of the *Ducane* exception.

The Board has accepted the court's remand and sets forth here a clarification of the *Ducane* exception and how it applies in this case.

The Board consistently has applied the equitable doctrine set forth in *Holmberg v. Armbrecht*.[3] Under that doctrine, if a party "has been injured by fraud and 'remains in ignorance of it without any fault or want of diligence

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[2] 273 NLRB 1389 (1985), enfd. mem. 785 F.2d 304 (4th Cir. 1986).

[3] 327 U.S. 392, 397 (1946).

or care on his part, the bar of the statute does not begin to run until the fraud is discovered. . . . ' "[4] This doctrine is the basis of the *Ducane* exception for fraudulent concealment. It is the doctrine which guided the Board's initial decision in this proceeding, and it guides us now.

Concededly, the Board did not state expressly that it was applying the *Holmberg* doctrine. In addition, the *Holmberg* doctrine does not explicitly set forth a standard concerning the character of the evidence that is concealed.[5] As to that issue, the D.C. Circuit cited *Fitzgerald v. Seamans*,[6] a case which relies on *Holmberg*. In *Fitzgerald*, the D.C. Circuit stated that "deliberate concealment of *material* facts" tolls the Federal statutes of limitations until the plaintiff discovers or with due diligence should

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[4] See, e.g., *Crown Cork Co.*, 255 NLRB 14 (1981); *ACF Industries*, 231 NLRB 83 (1977); *Burgess Construction*, 227 NLRB 765 (1977); *Avila Group, Inc.*, 218 NLRB 633 (1975).

[5] We note also that *Holmberg* does not itself explain what kinds of action by a defendant will be regarded as acts of fraudulent concealment. By embracing Holmberg, we do not necessarily adopt all the glosses on the fraudulent concealment doctrine set forth by various Federal courts. See *Truck Drivers & Helpers Local 170 v. NLRB*, 993 F.2d 990 (1st Cir. 1993) (noting that Board holdings have not followed Federal cases allowing a finding of fraudulent concealment on the basis of a "self-concealing scheme" as opposed to independent affirmative acts of concealment). In addition to considerations that have shaped that doctrine in the courts, the Board properly considers "the industrial relations policy favoring finality in the resolution of labor disputes." *Id.*, slip op. at 18. Board cases on the standard for determining whether "concealment" is present are cited at fns. 21-23, infra.

[6] 553 F.2d 220 (D.C. Cir. 1977).

have discovered the basis of the lawsuit.[7] (Emphasis added by court in instant case.) We agree with the *Fitzgerald* standard. We recognize that, in *Ducane* and in other subsequent cases, including the instant case, the Board used the phrase "operative facts." We regret doing so. We did not intend to denote a disagreement with the standard of "material facts," the phrase used in *Fitzgerald*. In this case and in the future, we shall use the latter term.

A. *The Board's Historical Application of the Holmberg Doctrine*

The *Holmberg* doctrine, as described in *Fitzgerald* and as applied by the Board, has three critical requirements: (1) deliberate concealment has occurred; (2) material facts were the object of the concealment; and (3) the injured party was ignorant of those facts, without any fault or want of due diligence on its part. All three elements must be met to warrant the tolling of a statute of limitations. In the instant case, the majority of the Board did not reach the first and third elements. Instead, the majority addressed only the element of whether the allegedly concealed evidence constituted material facts.[8] That is the only element we address here.

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[7] *Id.* at 228.

[8] Because the Board found the evidence was *not* material to the cause of action, it was unnecessary to reach the other elements of the *Holmberg* doctrine.

Chairman Stephens agreed with the analysis concerning material facts. He also relied on the judge's analysis of fraudulent concealment. See his dissent in *Kanakis Co.*, 293 NLRB 435 (1989).

Over the years, the Board has described the element of material facts in the *Holmberg* doctrine in different ways. It has referred to "violative conduct,"[9] an "act constituting [the unfair labor practice],"[10] "vital information,"[11] "material events,"[12] and "an essential element needed to perfect [the charging party's] case."[13] In 1982, the Board began consistently to use the term "operative facts." See *Winer Motors*.[14] The majority opinion in *Winer Motors* stated: "We agree with the principle enunciated in the cases relied on by our dissenting colleagues that where a respondent fraudulently conceals from a charging party the operative facts underlying a violation of the Act, the limitations period does not begin to run until the charging party knows or should have known of such operative facts." *Holmberg* was the lead case relied on by the dissenting opinion in support of that principle. As the above quotation demonstrates, the majority agreed with that principle.

The *Winer* rule applied to charges that were *withdrawn* and later resurrected. In *Ducane*, the Board held that the same rule would apply to charges that were *dismissed* and later resurrected. In both situations, a resurrection of the charge, outside the 10(b) period, would not be permitted unless there were "special circumstances in

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[9] *Avila Group, Inc.*, supra at 639.

[10] *Burgess Construction*, supra at 766.

[11] *ACF Industries*, supra at 83 fn. 1.

[12] *Crown Cork Co.*, supra at 22.

[13] *Safety-Kleen Corp.*, 279 NLRB 1117, 1119 (1986).

[14] 265 NLRB 1457, 1458 (1982).

which a respondent fraudulently conceals the operative facts underlying the alleged violation."[15]

The Board has applied the *Holmberg* doctrine in 8(a)(5) cases to find a tolling of the 10(b) period where respondents have concealed the employment of nonunion employees under nonunion conditions,[16] the dissolution of a multiemployer bargaining association,[17] the subcontracting of bargaining unit work,[18] the closing and relocation of a plant,[19] the closing and reopening of a plant,[20] and details of the interrelationship between two companies so as to convey the impression that the companies were entirely separate entities.[21]

In its application of the *Holmberg* doctrine, the Board has not treated every act of concealment as a form of fraudulent concealment that warrants tolling of the limitations period. The Board has found that exculpatory statements by a respondent which are false or misleading are not sufficient to toll 10(b) where the charging party independently was aware of certain facts suggesting possible unlawful conduct.[22] Similarly, the Board has found

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[15] *Ducane Heating Corp.*, supra at 1390.

[16] *Burgess Construction*, supra.

[17] *Lehigh Lumber Co.*, 238 NLRB 675 (1978).

[18] *ACF Industries*, supra.

[19] *Strawsine Mfg. Co.*, 280 NLRB 553 (1986).

[20] *O'Neill, Ltd.*, 288 NLRB 1354 (1988).

[21] *Barnard Engineering Co.*, 295 NLRB 226 (1989).

[22] *Girardi Distributors*, 307 NLRB No. 236, JD slip op. at 38-41 (July 24, 1992), enfd. sub nom. *Truck Drivers & Helpers Local 170 v. NLRB*, supra; *John Morrell & Co.*, 304 NLRB 896 (1991); *Al Bryant, Inc.*, 260 NLRB 128, 134-135 (1982). Compare

that the concealment of an unlawful motive for discharge will not toll the limitations period if the charging party is aware of facts which raise a question about the true motive for the discharge.[23] Finally, the Board has found no tolling of the statute in an unlawful discharge case when the concealed evidence did not have a direct bearing on the performance of the discriminatee's duties and thus did not amount to concealment of an "operative fact" pertaining to the alleged discharge.[24]

With respect to the issue under discussion, the relevant principle applied in these cases is that concealed evidence is "material" if it would make a critical difference between establishing a violation and not doing so. Thus, if the absence of that evidence results in the dismissal or withdrawal of the charge, the subsequent discovery of that evidence will permit the resurrection of the charge, provided that the other two elements are present, viz, the evidence was fraudulently concealed and the

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with *O'Neill, Ltd.*, supra, where the Board found that the respondent's exculpatory statements were part of a scheme of concealment and thus contributed to a finding that the limitations period should be tolled. Member Devaney dissented in *John Morrell & Co.*, supra, and finds it unnecessary to rely on it.

[23] *Safety-Kleen Corp.*, supra.

[24] *Duff-Norton Co.*, 275 NLRB 646 (1985).

injured party could not have discovered the evidence earlier through the exercise of due diligence.[25]

This principle is illustrated in *Duff-Norton*. In that case the concealed evidence was that a supervisor tampered with machines in order to "set up" a quality control inspector for discharge. Concededly, the evidence was relevant to the allegation of unlawful discharge. However, the Board essentially found that this evidence would not have made a critical difference in establishing a violation. The tampering caused the production of defective parts. The inspector was discharged for failure to spot the defective parts. Even if the evidence concerning the tampering had been adduced, the fact would remain that the inspector failed to spot the defective parts. In sum, the concealed evidence would not have made a critical difference in establishing a violation.

B. *The Board's Use of the Holmberg Doctrine in this Case*

Applying this standard in the instant case, the Board concluded that the Respondent's position papers were

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[25] We believe our approach is similar to that in *Hohri v. U.S.*, 782 F.2d 227, 249-250 fn. 57 (D.C. Cir. 1986), where the court clarified its standard for tolling a statute of limitations in a case of concealment. There, the court stated:

> We do not provide for tolling simply because a plaintiff's ability to mount a successful case has been impaired in some degree. Instead, we provide for tolling only when concealment has so impaired the plaintiff's case that he is not able to survive a threshold motion to dismiss for failure to tender a claim that would advance beyond the pleading stage.

not critical to the establishment of a violation. In reaching this conclusion, we reviewed the documents in a light most favorable to the General Counsel by assuming that they were authentic expressions of the Respondent's bargaining intentions. We did so despite the fact that they were records of preliminary meetings held some 3 months in advance of actual negotiations.

We analyzed the statements concerning job preference and mandatory transfers in the context of the entire document in which they appeared. Our review of the statements on job preference revealed only two statements which could support the General Counsel's case. The job preference position paper ended with a summary which stated, inter alia, "Shop management does not feel job preference significantly affects the cost of operating the shop."[26] The paper recommended that the issue not be raised in negotiations. Standing alone, these statements supported the allegation that job preference was not important for the Respondent. The statements thus raised questions as to why the matter was later pressed in negotiations. When the position paper was read as a whole, however, it indicated that job preference was a serious issue over which the Respondent and the Union had struggled for 3 years, that the recommendation not to negotiate job preference was based on a concern that failure at the negotiation table would weaken the Respondent's position if job preference were arbitrated, and that shop managers found that job preference was a "general annoyance" which made their jobs harder even though it

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[26] 299 NLRB 586, 587.

had a minimum cost impact.[27] The document as a whole, therefore, did not make a critical difference in establishing the General Counsel's case.[28]

We also took into account the indication in the steering committee's minutes that no final decision on job preference was taken at the June 1, 1981 steering committee's meeting. Instead, the minutes recorded that two representatives of a higher level of management stated they might want to review the issue again. On its face, therefore, the documents showed that the Respondent considered the issue of enough importance to its negotiating stance to leave it open rather than to drop it conclusively.

We reached a similar conclusion on the mandatory transfer documents. The position paper on transfers stated that managers had been able to use lack of work, temporary, and company-requested transfers with "very few problems," and noted that the Union had not held the Respondent to its contractual obligations to give a 5-day notice prior to layoff in cases where employees were to be transferred due to lack of work. The minutes

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[27] *Id.*

[28] *Id.* at 589. In our initial decision, we also stated that we found no inherent contradiction between the Respondent's June position papers and steering committee's minutes on job preference and mandatory transfers and the Respondent's September position papers for actual negotiations. *Id.* In so doing, we did not intend to suggest that only an inexplicable contradiction would be sufficient to warrant tolling of the statute. We were, instead, only disagreeing with the General Counsel's argument that the June documents contradicted the September documents.

of the steering committee stated that the managers "could live with the language as it is." These statements, standing alone, supported the allegation that mandatory transfers were not an important issue for the Respondent. The steering committee's minutes, however, showed that representatives of a higher level of management did not fully accept the shop managers' view on transfers and "expressed concern that we may still want to change the language." As in the case of job preference, the documents as a whole indicated that the Respondent considered the issue of enough importance to its negotiating stance to leave it open for consideration.

Reviewing the allegedly concealed documents as a whole and assuming they were an authentic expression of the Respondent's bargaining intentions, we found that they did not support the allegation that the Respondent engaged in surface bargaining.

We reaffirm these findings. Applying the standard set forth above, we conclude that, although the documents may be relevant to the charge of surface bargaining, they do not make a critical difference in establishing a violation. They therefore do not constitute material facts. Accordingly, the alleged concealment of these facts does not toll the 10(b) period.

ORDER

The National Labor Relations Board reaffirms its Order in the underlying proceeding, 299 NLRB 586 (1990), and dismisses the complaint.

Dated, Washington, D.C. September 27, 1993

James M. Stephens, Chairman

Dennis M. Devaney, Member

John Neil Raudabaugh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 12, 1991 Decided November 29, 1991

No. 90-1503

DISTRICT LODGE 64, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, AND ITS LOCAL LODGES 883, 1088, AND 1142, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

BROWN & SHARPE MANUFACTURING CO., INTERVENOR

Petition for Review of an Order
of the National Labor Relations Board

Marc B. Gursky, with whom *Allison Beck* and *Mark Schneider* were on the brief, for petitioner.

Fred L. Cornnell, Jr., Attorney, National Labor Relations Board, with whom *Jerry M. Hunter*, General Counsel, *Aileen A. Armstrong*, Deputy Associate General Counsel and *Peter Winkler*, Supervisory Attorney, National Labor Relations Board were on the brief, for respondent. *Judith A. Dowd*, Attorney, National Labor Relations Board, also entered an appearance for respondent.

William R. Powers, III, with whom *Thomas C. Keeney* was on the brief, for intervenor.

Before: RUTH B. GINSBURG, SILBERMAN and WILLIAMS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WILLIAMS.

WILLIAMS, *Circuit Judge*: Section 10(b) of the National Labor Relations Act specifies a six-month statute of limitations for unfair labor practice charges. It requires parties to file a charge with the National Labor Relations Board and to serve the charged party within six months of the alleged unfair labor practice:

> [N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made. . . .

29 U.S.C. § 160(b). In *Ducane Heating Corp.*, 273 NLRB 1389 (1985), *enforced without opinion*, 785 F.2d 304 (4th Cir. 1986), however, the Board adopted an additional time restriction in reliance on the policy underlying § 10(b), holding that if a charge is filed within the § 10(b) period but then dismissed, it may not be *reinstated* (by the Board's General Counsel) outside the § 10(b) period "absent special circumstances in which a respondent fraudulently conceals the operative facts underlying the alleged violation." 273 NLRB at 1390. The union attacks both the *Ducane* rule and its application here.

* * *

The union represents about 1600 workers at the Kingston, R.I., plant of Brown & Sharpe Manufacturing Company, a maker of machine tools. Its unfair labor practice charges arise out of a prolonged course of negotiations preceding a strike that began on October 18, 1981. The

parties had failed to reach agreement on two key issues: the prevailing noncontractual practice of "job preference" or "machine seniority", under which employees could exercise their seniority to obtain an assignment to a specific job or machine in their group; and "mandatory transfers", a provision in the collective bargaining agreement that prohibited the company from transferring employees without their permission.

The union filed two sets of timely unfair labor practice charges, one on November 5, 1981 and another on March 18, 1982, alleging that Brown & Sharpe had failed to bargain in good faith in violation of §§ 8(a)(1) and 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) & (5). In each case, the General Counsel dismissed the charges, initially through his Regional Director and then on appeal through his national Office of Appeals. On June 30, 1982, after the final dismissal of both charges, the union learned that David Waterman, the former Director of Industrial Relations at Brown & Sharpe, had sued the company for wrongful discharge, claiming that he had been fired for refusing to commit unfair labor practices. Relying mainly on Waterman's allegations, the union filed a third charge on September 29, 1982, alleging that the company had fired Waterman for refusing to "carry out a bargaining position designed to preclude reaching agreement", J.A. 14, thus asserting a theory of "surface bargaining". After various procedural ups and downs, the General Counsel's Regional Director pursued the Waterman leads and secured copies of company committee minutes and position papers on bargaining strategy. Relying on these discoveries, the Board's

General Counsel reinstated the earlier charges and issued a complaint on December 7, 1983.

When hearings began in 1984, Brown & Sharpe moved to dismiss the portion of the complaint containing the reinstated charges on the ground that the General Counsel had dismissed those charges and had not reinstated them until after expiration of § 10(b)'s six-month period. The ALJ reserved decision on the motion, and, while the company's special appeal from that order was pending, the Board issued its *Ducane* decision. Two weeks later the Board remanded the case to the ALJ for reconsideration in the light of *Ducane*. In April 1986 the ALJ found that *Ducane* required dismissal because the reinstatement occurred long after the running of § 10(b)'s six months. He also found that there was no evidence of fraudulent concealment. The ALJ conducted a hearing on some remaining charges in the complaint, but dismissed them on the merits in April 1989.

The Board affirmed, but did not rest on the ALJ's finding that there had been no fraudulent concealment. Instead, it found that the allegedly concealed evidence did not constitute "operative facts" because "even viewing the evidence in a light most favorable to the General Counsel's position, it does not support a finding that the Respondent advanced proposals as genuine absolutes when it actually did not consider the proposals to be important to its operations." J.A. at 153.

The union challenges the validity of *Ducane* itself, the Board's retroactive application of the doctrine, and the Board's explanation of its application here. We hold that *Ducane* is a reasonable implementation of the policy

behind § 10(b) and that the Board was free to apply it retroactively. We remand the case to the Board, however, to explain its application of the fraudulent concealment exception.

* * *

Although the union frames its attack on *Ducane* obscurely, it appears to contend that the doctrine is outside the scope of the Board's authority under § 10(b). By its terms that section only bars complaints based on claims that the *charging party* filed beyond the six-month period; once that limit is observed, as it was here, § 10(b) says nothing to limit the *General Counsel*'s authority to issue a complaint. While conceding that § 10(b) would not prohibit the Board from adopting a laches policy, the union nonetheless suggests that § 10(b) prevents the Board from adopting a fixed six-month limitation on the reinstatement of dismissed charges. Petitioner's Brief at 25 & n.7.

The statute's silence, however, clearly means that Congress has *not* "directly spoken to the precise question at issue", *Chevron USA Inc. v. NRDC*, 467 U.S. 837, 842 (1984), so that the Board is free to adopt any reasonable construction of the Act, *id.* at 842-43. See also *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 123 (1987); *Bentson Contracting Co. v. NLRB*, 941 F.2d 1262, 1264 n.2 (D.C. Cir. 1991) (construing § 10(b)). Thus, our observation in *Mourning v. NLRB*, 505 F.2d 421 (D.C. Cir. 1974), that "§ 10(b) puts a statute of limitations on the actions of the *charging party* (six months) and not on the General Counsel", *id.* at 424 n.10 (emphasis in original), merely restates the point that § 10(b) does not address

delay by the General Counsel, much less his dismissal and reinstatement of a charge. Indeed, in *Mourning* we specifically suggested that the Board was free to adopt a laches policy but said that we would not assume it had done so without a clearer statement from the Board. *Id.* at 424.

The union also relies on § 3(d) of the Act, 29 U.S.C. § 153(d), which states that the General Counsel "shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under [§ 10], and in respect of the prosecution of such complaints before the Board". But § 3(d) says nothing about the Board's authority to dismiss a reinstated complaint as time-barred. The purpose of § 3(d) was to separate the Board's prosecutorial and adjudicative functions. See generally *NLRB v. United Food & Commercial Workers Union*, 484 U.S. at 117-18, 124-25 (discussing legislative history and contemporaneous agency interpretation). The *Ducane* rule interferes with the General Counsel's prosecutorial independence in substantially the same (permissible) way as does a substantive ruling of the Board as to what constitutes an unfair labor practice; it interferes a good deal less than do the Board's regulations dictating the procedures the General Counsel must follow in the investigation, withdrawal, dismissal, and settlement of charges and the issuance of complaints. See 29 CFR §§ 101.4-101.8. Furthermore, the union's extravagant reading of § 3(d) would bar the Board from adopting a laches policy, which the union itself concedes is permissible.

Thus neither § 10(b) nor any other provision of the Act addresses the issue of time limits on revival of a

dismissed charge. Under *Chevron* the Board may fill this "gap" in the statutory scheme pursuant to its authority to implement that scheme. See 467 U.S. at 843-44. It may do so either by rulemaking under § 6 of the Act, 29 U.S.C. § 156, see 29 CFR §§ 101.1-101.43, or – as in *Ducane* – by adjudication, see, e.g., *Redd-I Inc.*, 290 NLRB No. 140 (1988) (reaffirming that amendments "closely related" to original charge relate back to date of original complaint), *approved in Sonicraft, Inc. v. NLRB*, 905 F.2d 146, 148-49 (7th Cir. 1990); *Forrest Industries, Inc.*, 168 NLRB 732 (1967) (limiting charging parties to one motion for reconsideration of General Counsel decisions). The choice between rulemaking and adjudication is up to the Board. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 291-95 (1974).

The Board's decision to "borrow" a fixed period of limitations, rather than to adopt a laches rule, is also within its discretion under the Act. The legitimacy of such borrowing is clear from the longstanding federal *court* practice of selectively borrowing statutes of limitations to fill gaps in federal statutes containing no express limitations periods, even though in that context such interstitial lawmaking continues to be the subject of attack, see *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 157-70 (1987) (Scalia, J., concurring). See generally Paul Bator, Paul Mishkin, Daniel Meltzer & David Shapiro, *Hart & Wechsler's The Federal Courts and the Federal System* 953-59 (3d ed. 1988). Indeed, the Supreme Court has borrowed § 10(b) itself to supply a time limit for employee suits against employers for breach of a collective bargaining agreement and against unions for breach of their fair representation duty. *DelCostello v. International Brotherhood of Teamsters*, 462

U.S. 151, 154-55 (1983). If a federal court might have borrowed § 10(b) here, surely the Board could do so under its undisputed authority to make policy decisions within the framework of the Act. Thus the Board's decision to treat dismissed charges as "disposed of and, in effect, ceas[ing] to exist" within the meaning of § 10(b), see *Ducane*, 273 NLRB at 1391 (footnote omitted), must be upheld if it is otherwise reasonable.

And we agree with the Board that *Ducane* reasonably promotes the policy of repose that § 10(b) contemplates. The rule gives charged parties "assur[ance] that, absent the existence of a properly served charge on file, [they] will not be liable for conduct occurring more than 6 months earlier," *Ducane*, 273 NLRB at 1391, and that they will not be called upon to defend themselves against stale charges " 'after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused' ". *Local Lodge No. 1424, International Ass'n of Machinists v. NLRB*, 362 U.S. 411, 419 (1960) (quoting H.R. Rep. No. 245, 80th Cong., 1st Sess. 40 (1947)). The repose that *Ducane* assures also advances § 10(b)'s goal of "stabiliz[ing] existing bargaining relationships", *Local Lodge No. 1424*, 362 U.S. at 419, enabling parties "to assess with relative certainty their obligations to each other", *NLRB v. Preston H. Haskell Co.*, 616 F.2d 136, 142 (5th Cir. 1980). For example, dismissal of a charge against a company for "dominat[ing] or interfer[ing]" with a union under § 8(a)(2), 29 U.S.C. § 158(a)(2), allows the company to negotiate with the union without fear that it will later be declared an invalid "company union". Similarly, dismissal of an employer's attack on a union's majority status under

§ 8(b)(4)(C), 29 U.S.C. § 158(b)(4)(C), and the passage of six months, will enable a union to negotiate a collective bargaining agreement without fear that the agreement might later be invalidated.[1]

The union notes gaps in *Ducane*'s protection against stale claims: the General Counsel's ability to wait an indefinite period before acting on a charge and *Ducane*'s exception for fraudulent concealment. It argues that because of these gaps the policy cannot *achieve* stability in labor relations. Obviously, however, an agency may adopt rules that fulfill their objectives only imperfectly, where statutory provisions or competing policy goals frustrate perfection.

At oral argument union counsel also argued that the Board could not reasonably invoke charged parties' interest in reliance on a dismissal, because at the time of the dismissals there was no *Ducane* rule signalling that reliance would be protected. *Cf. Sonicraft, Inc. v. NLRB*, 905 F.2d at 149 (whether dismissal of a charge has lulling effect depends on then-prevailing rule). It is quite true that in an abstract sense reliance interests are always circular; if the rule does not protect them, no one may reasonably rely. But that still leaves an agency free to

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[1] The union's argument that the decision to dismiss a complaint is not "final" and therefore does not assure the parties that the case has been concluded is meritless. The Regional Director's decision to dismiss a complaint is appealable only to the General Counsel and not to the Board or the courts, 29 CFR §§ 101.6 & 102.19, so the General Counsel's denial of such an appeal is final. See, e.g., *NLRB v. United Food & Commercial Workers Union*, 484 U.S. at 118-19 & nn.8 & 10; *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 138-39 (1975).

foster reliance for policy goals, such as (here) the stabilization of labor relations.

Finally, although the union raises the point obscurely if at all, we do not read the Board's opinion in *Ducane* as resting on a mistaken view that § 10(b) required the *Ducane* policy. Compare *Prill v. NLRB*, 755 F.2d 941, 942, 956 (D.C. Cir. 1985) (remanding where "Board failed to rely on its own judgment and expertise, and instead based its decision on an erroneous view of the law"). A couple of the Board's remarks in *Ducane* erroneously suggest that § 10(b) commands the decision: "[W]e would exceed our own authority were we to permit the General Counsel to ignore the statutory limitations proviso", *Ducane*, 273 NLRB at 1391; "We must . . . 'restrike the balance established by Congress when it added the proviso to Section 10(b)' ", *id.* (quoting *Winer Motors, Inc.*, 265 NLRB 1457, 1458 (1982)). Overall, however, we think the *Ducane* decision can fairly be read as adopting a policy in harmony with § 10(b) rather than construing the Act to require it. The Board's fundamental rationale was that reinstatement ten months after an alleged violation (as here) "contravened *the purposes* of the limitations proviso to Section 10(b) of the Act." *Ducane*, 273 NLRB at 1390 (emphasis added). The decision in effect extended *Winer Motors*, which applied § 10(b)'s six-month limit to reinstatement after *withdrawal* of a charge, to dismissal, reasoning that dismissal "by a government official well versed in the intricacies of labor law creates the impression on members of the public that the charge has been disposed of even more conclusively than . . . when it is merely withdrawn." *Id.* at 1391 (footnote omitted). Considered in its entirety, then, the Board's opinion is fairly

viewed as adopting one of several possible policy choices consistent with the purposes of the Act. *See Bowman Transportation v. Arkansas-Best Freight System*, 419 U.S. 281, 286 (1974) (court upholds "a decision of less than ideal clarity [where] the agency's path may reasonably be discerned").

* * *

Although the Board applied *Ducane* retroactively to the parties in *Ducane* itself, the union argues that its application *here* has caused "manifest injustice" and was therefore improper under our decisions limiting agency authority to apply "new rules" retroactively. *See Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987) (en banc); *Retail, Wholesale & Department Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972). Whether *Retail Union* supplies the governing standard, as the union and Board assume, or *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991), controls, as intervenor Brown & Sharpe argues, we uphold retroactive application.

Brown & Sharpe argues that Beam makes retroactive application of *Ducane* not merely permissible but required. There six justices agreed that federal courts must never apply "selective prospectivity" to their own decisions: if a federal court applies a new judicial rule to the parties in the case announcing the rule, it must do so in all other cases that come before it on direct appeal (even where the relevant conduct occurred before the case announcing the new rule). Whether *Beam* should apply to *agency* adjudications is unclear. Justice Souter's analysis, joined by Justice Stevens and seemingly adopted

by Justice White, *see id.* at 2448-49 (White, J., embracing "pure prospectivity" but "concur[ring] in the judgment on the narrower ground employed by Justice Souter"), reasoned that selective prospectivity "breaches the principle that litigants in similar situations should be treated the same, a fundamental component of *stare decisis* and the rule of law generally," *id.* at 2444. This concern for equity and the rule of law would seem applicable to agency adjudications. Indeed, the agencies' parallel legislative power might be read to tilt the balance more strongly against allowing prospective adjudicative overrulings, as it provides agencies an alternative means for making radical changes prospectively. Cf. *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947) (agencies' possession of rulemaking power means "less reason to rely upon *ad hoc* adjudication to formulate new standards of conduct"). In any case, Justices Blackmun, Scalia, and Marshall, in opinions by the first two, joined the judgment on the ground that Article III forecloses any prospectivity for federal adjudications, whether "pure" or "selective". See *id.* at 2449-50 (Blackmun, J., concurring in the judgment); *id.* at 2450-51 (Scalia, J., concurring in the judgment). These Article III grounds are inapplicable to administrative adjudications, so *Beam* does not clearly foreclose selective retroactivity here.

In any event, retroactive application of *Ducane* was proper under our prior precedents. We have commonly said that analysis of retroactivity for agency decisions required consideration of five factors:

> (1) whether the particular case is one of first impression, (2) whether the new rule represents

> an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

Retail Union, 466 F.2d at 390 (quoted in *Clark-Cowlitz*, 826 F.2d at 1081 and Local 900, *International Union of Electrical, Radio & Machine Workers v. NLRB*, 727 F.2d 1184, 1194 (D.C. Cir. 1984)). This test appears substantively indistinguishable from the standard for judicial retroactivity set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). That test required retroactivity unless (1) the decision creates a new rule, either by overruling past precedents relied upon by the parties or because it was an issue of first impression [paralleling *Retail Union*'s first and second factors], (2) retroactive application will be more likely to hinder than to further the operation of the new rule [paralleling *Retail Union*'s fifth factor]; and (3) retroactive application would produce "substantial inequitable results" [paralleling *Retail Union*'s third and fourth factors]. See *Chevron Oil*, 404 U.S. at 106-07. For simplicity's sake, we follow the *Chevron Oil* sequence.

First, although *Ducane* did modify existing law, Board precedent was neither clear nor consistent during the time that the union's initial charges were still pending before the General Counsel, between November 5, 1981 (first charge filed) and June 16, 1982 (dismissal of second set became final). It is true that between 1977 and 1982, the Board interpreted § 3(d) of the Act as granting the

General Counsel "virtually unlimited discretion" to reinstate dismissed charges based on "newly discovered evidence", even if reinstatement occurred outside the six-month limit of § 10(b). See *California Pacific Signs*, 233 NLRB 450, 451 (1977). Neither the union nor the General Counsel, however, can have reasonably regarded *California Pacific Signs* as settled law. As the Board itself has acknowledged, "consistency of rationale or result . . . has not been a hallmark of the Board's treatment of these cases." *Winer Motors, Inc.*, 265 NLRB at 1458 (footnotes omitted). Although there appear to be no pre-1977 cases involving reinstatement of *dismissed* charges, the Board had changed its position on the reinstatement of *withdrawn* charges[2] on several occasions from 1950 through 1977. Compare *Koppers Co.*, 163 NLRB 517 (1967) (prohibiting the reinstatement of withdrawn charges after the § 10(b) period had expired); *Square D Co.*, 105 NLRB 253 (1953) (same); *Olin Industries*, 97 NLRB 130 (1951) (same), with *Silver Bakery*, 150 NLRB 421, 424-25 (1964) (General Counsel "has virtually unlimited discretion to proceed on charges as he deems fit"), *enforcement denied*, 351 F.2d 37 (1st Cir. 1965). Although *Ducane* involved dismissed and not withdrawn charges, the Board's extension of its doctrine to dismissals was not an extreme or unpredictable step. Indeed, as noted above, the Board reasonably

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[2] "Withdrawn charges" are charges withdrawn by the charging party with the General Counsel's consent. Under the Board's rules, when the General Counsel believes that a complaint should not issue, he or she must first ask the charging party voluntarily to withdraw the charge; if the charging party refuses, then the General Counsel dismisses the charge. See 29 CFR §§ 101.5, 101.6.

argued in *Ducane* that parties may be more likely to impute finality to dismissal than to withdrawal. Thus, *Ducane* is not the sort of radical transformation whose retroactive application is likely to be unfair.

Second, retroactive application of *Ducane* seems likely to further the purposes of both rule and statute in the same measure as it will in future applications. Indeed, the union makes no argument to the contrary. Application clearly avoided the use of stale evidence, with the attendant risks of inaccuracy. It also tended to stabilize labor relations, at least from the time that the decision of *Ducane* itself made it likely that the dismissed charges were forever dead. Of course application of *Ducane* here means that possibly valid charges will lose without full consideration on their merits. But that is the consequence of any limitations or laches rule; once the Board has decided that the trade-off favors the time bar, there is no reason to delay the application.

Finally, we do not believe that retroactive application of *Ducane* will produce "substantial inequitable results". Not only do the Board's past vacillations weaken any basis for possible union reliance on pre-*Ducane* law, see, e.g., *Local 900*, 727 F.2d at 1195, but the union has failed to identify any likely type of reliance. Its opening brief asserted, "[c]learly, [the union] relied on" the prior policy, without specifying a single way in which it might have done so. Petitioner's Brief at 34. The Reply claimed that advance knowledge of the new rule would have affected "the timing of the Union's charge, the nature of the investigation, the request for an investigatory subpoena [that the union made after Waterman sued Brown & Sharpe in June 1982], and infinite other actions". Reply

Brief at 8. The most concrete of these possibilities is the request for an investigatory subpoena. But how could foreknowledge of *Ducane* have led the union (or the Board's regional office) to make a request that would have been based on the Waterman revelations, before those revelations were made? The more general points seem to add up to a suggestion that the union and the General Counsel may have been somewhat easygoing in their investigations, with an expectation that the charges might be dismissed but with a vague hope of later revival. But the union offers no evidence to suggest any such reliance, which at best would not supply a compelling equitable claim – even assuming that retroactivity analysis is concerned with reliance on anything other than primary conduct. *Cf. NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974) (distinguishing cases "in which some new liability is sought to be imposed on individuals for past actions which were taken in good-faith reliance on Board actions"); *NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1966) (Friendly, J.); *Payne v. Tennessee*, 111 S. Ct. 2597, 2610 (1991) (*stare decisis* is most important in "cases involving property and contract rights, where reliance interests are involved, [whereas] the opposite is true in cases . . . involving procedural and evidentiary rules").

The union extends its retroactivity analysis to argue that retroactive application of *Ducane* – indeed, any application – would be unjust because the Board may not impose the "consequences of its own misfeasance" on the parties. Petitioner's Brief at 31, Reply Brief at 8. The cases it cites, *NLRB v. J.H. Rutter-Rex Manufacturing Co.*, 396 U.S. 258 (1969) and *NLRB v. International Ass'n of Bridge,*

Structural & Ornamental Ironworkers, 466 U.S. 720 (1984), support no such proposition. Rather, in sustaining Board orders of back-pay that the Board's long delay had greatly increased, those decisions protected the Board from the courts of appeals' interferences with its discretion, reasoning that "the Board is not *required* to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers." *J.H. Rutter-Rex*, 396 U.S. at 264-65 (emphasis added) (quoted in *Ironworkers*, 466 U.S. at 725). Investigative foul-ups by the General Counsel necessarily burden one party or another (the charging party under *Ducane*, the charged party under its opposite); neither inequity is necessarily greater than the other, and it is within the Board's discretion to strike the balance as it has. *Cf. Mourning v. NLRB*, 505 F.2d at 424 n.10.

Thus, assuming that we should still analyze the retroactivity of new rules created in agency adjudications under the multi-factor balancing invited by *Retail Union* and *Chevron Oil*, we find no reason here to interfere with the Board's decision.

* * *

In dismissing the complaint, the ALJ found no basis to apply *Ducane*'s exception for the case in which "a respondent fraudulently conceals the operative facts underlying the alleged violation." 273 NLRB at 1390. He noted that Brown & Sharpe produced witnesses who sought to convince the Regional Director that it had bargained in good faith, and "provided, as requested, bargaining notes, correspondence, and the proposals and counterproposals". Although the company did not come

forward with committee minutes or position papers, it had no duty to do so, for the investigator never requested them. J.A. at 96-98; 109-10.

The Board ignored this finding, so it is not under review. Instead the Board rested its affirmance on the ground that the new evidence did not amount to "operative facts" within the meaning of the exception. We are unable to make enough sense of the Board's opinion to justify affirmance without further explanation. *See Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970).

As a finding that the minutes and position papers, even if fraudulently concealed, did not amount to "operative facts", the Board's decision leaves completely obscure just how significant the facts must be. In considering federal statutes of limitations, we have said that "deliberate concealment of *material* facts" tolls the statute until the plaintiff discovers or with due diligence should have discovered the basis of the lawsuit. *Fitzgerald v. Seamans*, 553 F.2d 220, 228 (D.C. Cir. 1977) (emphasis added). Of course the Board may wish to use another standard, and may well be free to do so. But it does not explicitly embrace any standard, and we find it hard to relate the Board's implicit standard to the facts.

Its core conclusion seemed to be that "the documents do not support the allegation [of] surface bargaining". J.A. 160. But even assuming the claim ultimately to be completely meritless, the Board's analysis itself points to *some* evidence supportive of the claim. For example, the Board notes that "the position paper on [mandatory]

transfers states that managers have had very few problems with them." *Id.* at 159. This statement surely gives some support to the union view that treatment of mandatory transfers as an absolute was contrived, cf. *Sign and Pictorial Union Local 1175 v. NLRB*, 419 F.2d 726, 731 (D.C. Cir. 1969), even if, on balance, a fact finder would conclude that the higher levels of Brown & Sharpe's management acted in good faith in rejecting the position paper's recommendation. Our inference that the Board was demanding a good deal more than "support" is reinforced by its remarks that particular pieces of evidence are not "inherently contradictory", see J.A. at 159-60, seeming to suggest that only an inexplicable contradiction would be enough, regardless of whether the company offered an explanation.

We might try to view the Board's opinion as a merits ruling – a finding that the allegedly concealed evidence (together with other evidence such as the Waterman testimony) did not amount to a violation of the Act. Several difficulties prevent our affirming on that ground. First, the Board appears not to have any procedure (equivalent to motions under Rule 12(b)(6) or Rule 56 of the Federal Rules of Civil Procedure) whereby it could consider the legal sufficiency of an unfair labor practice claim without a hearing before an ALJ. Rather, the Board reviews ALJ determinations made after hearing, evaluating the entire record, including the ALJ's factual findings. See 29 CFR § 101.12(a). Here there were no findings on the merits, as the ALJ had dismissed the case under *Ducane*. Moreover, had there been a merits hearing, opposing counsel would have had a chance to brief the merits before the Board. *Id.*

Second, even if some procedural equivalent to Rule 12(b)(6) or Rule 56 existed, the Board's decision does not seem to view the evidence in the light most favorable to the (hypothetical) non-moving party (the union), although the Board claimed that it had, see J.A. at 153. For example, we have already pointed to the Board's writing off some statements as not "inherently contradictory" of others; in doing so the Board (without any apparent support) seemed to dismiss inferences that might have been significant, especially if reinforced by Waterman's testimony. Indeed, the Board's complete disregard of what Waterman had said and might say is itself inconsistent with the analogy to Rule 12(b)(6) or Rule 56.

Thus we cannot sustain the Board's treatment of the fraudulent concealment exception. It is not a reasoned application of any intelligible standard, and as a finding that the charge was meritless it was not preceded by adherence to the necessary procedures.

* * *

Accordingly, although we uphold both the *Ducane* rule and the Board's authority to apply it to a charge for which the period had already run, we remand the case to the Board for resolution of the fraudulent concealment issue.

So ordered.

299 NLRB No. 89

SCD

D--1436
North Kingstown, RI

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

BROWN & SHARPE MANUFACTURING COMPANY	Cases	1-CA-19224 1-CA-19690 1-CA-19958 1-CA-20283 1-CA-20291 1-CA-20304 1-CA-20508 1-CA-21560
and		
DISTRICT LODGE 64, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, and its LOCAL LODGES 883, 1088 and 1142	Case	1-CA-19567
and		
LOCAL NO. 119, INTERNATIONAL FEDERATION OF PROFESSIONAL & TECHNICAL ENGINEERS, AFL-CIO		

DECISION AND ORDER

On April 5, 1989, Administrative Law Judge Benjamin Schlesinger issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs. The Respondent filed a cross-exception and supporting argument and a brief in support of the decision of the administrative law judge, in opposition to the exceptions of the General Counsel and the Charging Party, and in reply to the briefs in support of exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exception, and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified and to dismiss the complaint in its entirety.

1. The judge found, and we agree for the reasons stated below, that certain allegations of bad-faith bargaining by the Respondent are barred by Section 10(b) of the Act. The allegations at issue are that the Respondent engaged in surface bargaining by insisting, without valid economic considerations, on certain proposals as absolute, without which it could not reach any agreement. As more fully set forth in section I of the judge's decision, the charges involving these allegations initially were dismissed by the Regional Director on the ground that the investigation showed that the Respondent's proposals were advanced because of lawful business considerations. The General Counsel affirmed the Regional Director's dismissal on appeal. Approximately 2 years later, the General Counsel reinstated the charges in light of evidence discovered in the investigation of a new unfair labor practice charge concerning David Waterman, the Respondent's former industrial relations director.

The evidence consists of minutes and position papers of the Respondent's steering committee, dated from March to September 1981, concerning preparations for negotiations for a new contract in September 1981.[1] The

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[1] All dates are in 1981 unless otherwise indicated.

General Counsel argues that these documents show that the Respondent's contract proposals were not advanced for lawful business reasons. The General Counsel contends that under the rationale of *Ducane Heating Corp.*,[2] the Respondent's failure in the initial investigation to disclose documents which contradict its assertion that its proposals were legitimate, as well as its intentional mischaracterization of the proposals as absolutes, amount to fraudulent concealment of operative facts warranting the tolling of the 10(b) limitations period.

We find no merit in this argument. Having reviewed the evidence allegedly concealed, we find that it does not sufficiently support the charge so as to warrant extending the 10(b) limitations period. The Board similarly rejected the General Counsel's attempt to reinstate a charge outside the 10(b) period in *Duff-Norton Co.*, 275 NLRB 646 (1985). In that case, a charge alleging that the Respondent discharged employee Privette in violation of Section 8(a)(3) and (1) was dismissed. Approximately 16 months later the General Counsel reinstated the charge because the Respondent's former supervisor, Tucker, gave an affidavit indicating that he had set Privette up for discharge by tampering with certain machines. The Board, citing *Ducane Heating Corp.*, supra, noted that a dismissed charge may be reinstated outside the 6-month limitation period of Section 10(b) if a respondent fraudulently conceals operative facts underlying the violation alleged. However, the Board concluded that there was nothing in

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[2] 273 NLRB 1389 (1985), enfd. mem. 785 F.2d 304 (4th Cir. 1986).

the *Duff-Norton* case which warranted extending the limitations proviso. Reviewing the evidence proffered by the General Counsel, the Board found that even assuming Supervisor Tucker tampered with the machines as alleged and that this, in part caused the production of defective parts, Tucker's action would have affected Privette only indirectly because he inspected parts but did not produce them. Further, the Board found that Tucker's tampering would not have explained all of the defects or the delay in discovering defects that the Respondent had cited as reasons for discharging Privette. In such circumstances, the Board found there was an insufficient nexus between Tucker's asserted tampering and Privette's performance of his inspection duties so as to conclude that the Respondent fraudulently concealed the operative facts pertaining to Privette's discharge. In essence, the Board held that the evidence must sufficiently support the charge before it can be used as a basis for extending the 10(b) period.

We make the same holding here. After reviewing the evidence the General Counsel seeks to introduce, we find that even viewing the evidence in a light most favorable to the General Counsel's position, it does not support a finding that the Respondent advanced proposals as genuine absolutes when it actually did not consider the proposals to be important to its operations. The evidence, therefore, does not warrant the conclusion that the Respondent concealed the operative facts pertaining to its bargaining intentions either by mischaracterizing its proposals as absolutes or by failing to disclose the steering committee minutes and position papers.

The General Counsel's argument focuses on the Respondent's proposals concerning job preference[3] and mandatory transfers which led to a stalemate in negotiations. The General Counsel points to one document, dated June 1, entitled "Position Paper/Job Preference" and to another dated May 29, entitled "Position Paper Transfers." According to the steering committee minutes, these papers as well as five other position papers were presented to the committee at its June 1, 1981 meeting.

The paper on job preference describes the concept as having its roots in the incentive system where the equipment an employee operated significantly affected his earning ability. The paper states that when the incentive system was dropped in 1967, employees began to exercise job preference in order to improve their working conditions, e.g., get assigned to less demanding equipment in clean rooms. The history section of the paper ends as follows:

> For the last three years the company and Union have been constantly battling over job preference with each party trying to erode the other party's position. The Company has attempted to

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[3] Job preference or machine seniority gives an employee the right to exercise seniority to obtain an assignment to a specific job or machine which could not be operated by another employee. The employee assigned to the machine can not be assigned to a different machine even temporarily, unless the employee's assigned machine remains idle during the transfer. This exercise of seniority is called machine seniority in the production and maintenance unit and job preference in the office clericals unit. The proposals and discussions in negotiations on this issue for the two units were substantially the same.

> build favorable past practices which would negate the job preference past practice. The Union has been in a challenge position, grieving whenever they find the Company not honoring job preference. The Company is looking for a grievance to take forward to arbitration to destroy the concept of job preference while the Union is looking for a grievance to arbitrate with which they can win job preference.

The paper goes on to state that a survey of managers in the Machine Tool Division and the Industrial Products Division indicated that the managers "felt that job preference had minimum cost impact but was a general annoyance. The absence of job preference would make the managers' job easier."

With regard to negotiating objectives, the paper concludes: "The Company should not negotiate concerning job preference since failure at the negotiations table would severely weaken the company's case if we decided to arbitrate it." The paper ends with the following summary:

> Job preference is an issue best addressed by the establishment of favorable past practice. Shop management does not feel job preference significantly affects the cost of operating the shop. This feeling is based on the knowledge of shop managers that an employee that exercises job preference and cannot perform the job they have transferred to can be disciplined and discharged.

The minutes of the June 1, 1981 meeting indicate that a final decision was not taken on whether job preference should be raised in negotiations. Under the heading of

job preference, the minutes state: "Both Bill Masser and Howard Geyer said they might want to review this again even though it was recommended that it be dropped."[4]

The position paper on transfers begins with the following history:

> Managers have been able to use lack of work, temporary and company request transfers with very few problems. Some managers have used the company request transfer as a way to avoid notification of the union for a lack of work situation.
>
> The union has not held us to our contractual obligations in regard to a five-day notice prior to layoff if the employee was to be transferred due to lack of work.

After reviewing the contract language on transfers, the paper ends with the following summary: "It is the opinion of this Committee that we can effectively deal with the current contract language."

The minutes of the June 1, 1981 meeting again indicate that a final decision was not taken on the issue of transfers. Under the heading "Transfers," the minutes state: "The position paper stated that managers could live with the language as it is; and, again, Bill Masser and Howard Geyer expressed concern that we still may want to change the language."

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[4] Masser was vice president and general manager of the Industrial Products Division. Geyer was vice president in charge of the Machine Tool Division.

Negotiations for the new contract began on September 4. The minutes of the September 10 steering committee meeting contain another position paper on job preference. It states there has been a significant increase in the Union's attempt to solidify job preference. Under the heading "Cost Benefit," the paper states: "Substantial psychological impact for management. More effective utilization of employees within labor grade resulting in a 3 percent to 5 percent productivity improvement. (1.2 million savings – labor plus fringe benefits)." The paper predicts that the Union's response will be "extremely emotional" and evaluates the risk of proposing the elimination of job preference as: "High. Poll for all work assignments within labor grade. If the Company does not prevail, job preference becomes a fact." The paper ends with the following recommended positions:

> Only address the question if we intend to take a strike on the issue.
>
> Eliminate "transfer" and add "permanent."
>
> Within an occupational code management will make all machine assignments with its discretion.
>
> Strike issue.

The September 10 minutes also contain a document entitled "Recommended First Proposal." This document identifies certain high-risk issues. Concerning job preference, it states:

> Job preference was the highest-risk item identified by the Company Negotiating Committee. If the Company proposes elimination of job preference and does not succeed, the concept of job preference will no longer be an issue of

past practice, but, in fact, an operating condition in the plant, whereby employees would be able to select their job – i.e., machine or permanent assignment, whenever an opening occurred on their shift within labor grade. It is the Committee's assessment that if the Union takes a case of job preference to arbitration, the company will lose the case. If the Company is going to propose elimination of job preference, it is the committee's recommendation that the Company be prepared for a six-month strike, plus a high economic settlement. The Company Negotiating Committee makes the following recommendations on Job Preference:

a. If the Company intends to stay in Rhode Island for an extended period, the elimination of job preference should be proposed, and the Company should be willing to take a six-month strike to achieve it with high economics.

b. If the Company proposes elimination of job preference and it is not achievable during these negotiations without a strike, and as a result of that the Company decides that it will move within a few years, the Company should not be willing to take a strike over job preference.

The September 10 minutes also include a position paper on "Company Request Transfers." This paper identifies involuntary company request transfers as a negotiating objective. Under the heading "Cost Benefit," it states: "Would have to work the junior employee for temporary lack of work. Utilization of skills. Because most of skills are grouped there is a limited utility in mandatory transfers outside seniority groups. Flexibility. Improve Productivity." The paper states that the risk of

proposing mandatory transfers is "high" and recommends four company positions:

> Company Request transfers will be mandatory.
>
> Company Request transfers for 30 working days per quarter for good business reason.
>
> Company Request transfers of 30 working days per employee for the life of this agreement.
>
> Mandatorily transfer a person for a specified period of time to another seniority group with the same occupational code.

The document setting forth the recommended first proposal also lists mandatory transfers as a high-risk issue and states:

> Mandatory Transfers was identified as a high-risk proposal. The Company Committee feels that with the proper safeguards and a Union recommendation, mandatory transfers would be acceptable by the membership with a reasonable economic package.

The General Counsel contends that these documents show that in June 1981, job preference and mandatory transfers were nonissues for the Respondent, that job preference in fact had been rejected because of its minimum cost impact. The General Counsel argues that the documents therefore contradict the Respondent's assertions during bargaining that job preference and mandatory transfers were issues which for legitimate business reasons it considered absolute.

We find no merit in the General Counsel's position. Even assuming the existence and authenticity of the

steering committee position papers and minutes as an expression of the Respondent's bargaining intentions, we find that these documents do not support a finding that job preference and mandatory transfers were nonissues for the Respondent.

With respect to job preference, the June 1 position paper does not describe it as an unimportant matter. Instead, the paper stresses that the Respondent and the Union struggled over this issue for 3 years, with the Respondent attempting to build a practice which would negate the job preference past practice and the Union challenging each such attempt. Nor does the paper indicate that the recommendation to drop the issue from negotiations was based on its minimum cost impact. Rather, the paper states that job preference should not be negotiated because "failure at the negotiations table would severely weaken the Company's case if we decided to arbitrate it."

Although the June 1 paper refers to the insignificant cost effect of job preference, this is not cited as a reason to drop the issue from negotiations. Rather, the paper reports that it is the opinion of shop managers that although job preference is a general annoyance which makes their jobs harder, it did not significantly affect operating costs. The shop managers' feelings that the cost effect of job preference was insignificant was attributed to their knowledge that they could discipline and discharge an employee who did not perform the job he had gotten through job preference. Higher level management's assessment of cost is not mentioned in the paper.

Finally, the minutes of the June 1 steering committee meeting indicate that contrary to the General Counsel's assertion, the issue was not rejected in June. Rather, two higher level managers, Masser and Geyer, were recorded as stating they might want to review it again even though the position paper recommended that it be dropped.

A review of the September 5 position paper on job preference and the September 10 recommended final proposal does not show a shift in the Respondent's evaluation of the importance of the issue, but rather a shift in the strategy for dealing with it. Both the June and September positions express awareness of the danger of losing the issue in negotiations. The June paper, however, recommends dropping job preference from negotiations, while the September documents recommend raising the issue but only if the Respondent intends to stay for an extended period in Rhode Island and is willing to take a 6-month strike with a high economic settlement.

The September documents also show a shift in the cost assessment of job preference. We fail to see, however, how this shift indicates, as the General Counsel urges, that the Respondent found an insignificant cost impact in June but inexplicably found a significant impact in September. As noted above, the June position was based on shop managers' feelings that the cost was insignificant because they would be able to discipline or discharge an employee who was not performing the job he got through job preference. It was not presented as a view held by all sections of management. Nor were the recommendations of the June paper accepted by the full steering committee. In contrast, the September paper is attributed to the full

steering committee, including higher levels of management, and asserts that the elimination of job preference would have a "substantial psychological impact for management" and would result in a 3 to 5 percent productivity improvement. We see nothing inherently contradictory between an opinion of lower level management that the cost is insignificant because of the ability to discipline and discharge employees, and a higher level management opinion that the cost is significant because of the psychological impact on management and the utilization of employees within labor grade.

Finally, even assuming the position in the June 1 paper contradicts the September position, the General Counsel's argument fails because the recommendations of the June 1 paper were not adopted at the June 1 meeting of the steering committee and thus cannot be viewed as an expression of the Respondent's position on job preference at that time.

Our review of the documents on mandatory transfers leads to the same conclusion. The May 29 position paper on transfers states that managers have had very few problems with them. It is silent on the question of cost impact. As was the case with job preference, the recommendation of the paper to stay with the current contract language on transfers was not accepted by the full steering committee. The minutes for the June 1 meeting state that Masser and Geyer expressed concern that the Company might want to change the language. The documents indicate, therefore, that there was no determination in June that transfers were not an issue for negotiations.

The September position paper and recommended final proposal are attributed to the full steering committee. The position paper states that mandatory transfers would result in utilization of skills, flexibility, and improved productivity. The recommended final proposal acknowledges that mandatory transfers is a high-risk proposal but expresses the view that with proper safeguards and a union recommendation, the membership would accept it with a reasonable economic package. We see no inherent contradiction between this position and the May 29 position which made no attempt to analyze cost factors and merely stated that the managers had few problems with transfers and could live with the current contract language.

Further, as was the case with job preference, we find that even assuming the position of the May 29 paper contradicted the September position, the General Counsel's case is not established because the recommendation of the May 29 paper was not adopted at the June 1 steering committee meeting and thus cannot be viewed as an expression of the Respondent's intentions concerning transfers at that time.

Accordingly, our review of the steering committee position papers and minutes does not support a finding that the Respondent advanced proposals in negotiations as absolutes based on valid business considerations, when the Respondent had in fact determined that the proposed items were not important and did not require change from the expired contract. Because the documents do not support the allegation that the Respondent engaged in surface bargaining, the Respondent's failure to disclose them, or its characterization of its proposals as

legitimate absolutes, could not amount to a fraudulent concealment of the operative facts underlying the alleged violation of Section 8(a)(5).[5] For these reasons, we agree with the judge's conclusion that the allegations of the complaint which are based on the unfair labor practice charges in Cases 1-CA-19224, 1-CA-19567, and 1-CA-19690 must be dismissed because the General Counsel has not established that the 10(b) limitations period should be extended.

2. The judge further found, and we agree, that the Respondent did not violate Section 8(a)(5) and (1) of the Act by refusing to reveal to the Union the names of current employees who were strike replacements. We disagree with his finding, however, that the Respondent violated Section 8(a)(5) by withholding from the Union the names of strike replacements who had been terminated.

With respect to the Union's request for the names of current employees, the judge noted testimony that there were two mass demonstrations in which people were injured and property was damaged, that a van exploded, and that the General Counsel issued a complaint alleging 28 separate incidents of conduct by the Union including threats of bodily harm, rock throwing, arson, detonating

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[5] In light of this conclusion, we find it unnecessary to rely on the judge's application of *Ducane Heating Corp.*, supra. Chairman Stephens would rely both on the analysis under *Duff-Norton Co.*, 275 NLRB 646 (1985), set out above and on the judge's analysis under *Ducane Heating Corp.*, supra. See his dissent in *Kanakis Co.*, 293 NLRB No. 50 (Mar. 24, 1989), slip op. at 20-21.

explosive devices, and assault.[6] The judge also noted that although most of the violence took place at or near the Respondent's facilities, some employees were harassed at their homes and some were assaulted at places where they met to carpool. The judge finally noted that at the hearing the Union neither denied that these acts of violence occurred nor denied that it was responsible for them. The judge found that in this setting, the Respondent had a reasonable basis for believing that the Union was fostering the violence. He concluded that there was, therefore, a clear and present danger that the Union would continue the violence and there was a substantial reason for the Respondent to withhold the names of current employees.[7] We agree with this analysis.

Regarding the refusal to give the names of terminated strike replacements, however, the judge found that because there was an attempt to disrupt the Respondent's business by preventing the Respondent's employees from reporting to work, there would be little purpose for the Union to commit violence against employees who were no longer working for the Respondent and not reporting to work. The judge concluded there was, therefore, no clear and present danger that the Union would take action against terminated employees and that the

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[6] The judge found that although the informal settlement of the case involving these allegations did not constitute a confession of liability, there was nevertheless enough proof to convince the Regional Director to issue a complaint.

[7] *Burkart Foam*, 283 NLRB 351, 356 (1987), enfd. 848 F.2d 825 (7th Cir. 1988); and *Safelite Glass*, 283 NLRB 929, 948-949 fn. 26 (1987).

Respondent had no justification for withholding their names.

The Respondent argues, on cross-exception, that the judge's conclusion concerning terminated employees is inconsistent with his conclusion concerning current employees. The Respondent stresses that there was uncontradicted evidence of massive violence at the plant and that employees were being harassed and assaulted away from the plant. The Respondent argues that in these circumstances there is no basis for the judge's finding that no clear and present danger existed that the Union would take action against replacements and line crossers even after termination of employment. We find merit in this argument.

The Union did not deny at the hearing that widespread violence occurred at the plant or that strike replacements or line crossers were harassed and assaulted away from the plant. Nor did it deny responsibility for these acts. With such evidence of violence directed against strike replacements, occurring not only at the picket line but at their homes and other places away from the plant, we find that there is a clear and present danger that violent action might be taken against those who replaced strikers regardless of whether they continued to work or had been terminated. We, therefore, find that the Respondent had a substantial reason for withholding the names of strike replacements who had been terminated and did not violate Section 8(a)(5) of the Act by refusing to reveal those names to the Union.

ORDER

The complaint is dismissed.

Dated, Washington, D.C. August 28, 1990

James M. Stephens, Chairman

Mary Miller Cracraft, Member

Dennis M. Devaney, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

JD-13-89
North Kingston, RI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

BROWN & SHARPE MANUFACTURING COMPANY	Case Nos. 1-CA-19,224 1-CA-19,690 1-CA-19,958 1-CA-20,283 1-CA-20,291 1-CA-20,304 1-CA-20,508 1-CA-21,560
and	
DISTRICT LODGE 64, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, and its LOCAL LODGES 883, 1088 and 1142	Case No. 1-CA-19,567
and	
BROWN & SHARPE MANUFACTURING COMPANY	
and	
LOCAL NO. 119, INTERNATIONAL FEDERATION OF PROFESSIONAL & TECHNICAL ENGINEERS, AFL-CIO	

Joseph F. Griffin, Esq., of Boston, MA,
Counsel for the General Counsel.
William R. Powers, Esq., and *Thomas C. Keeney, Esq.* (*Powers, Karsch & Kinder, Inc.*), of Providence, RI, for Respondent.

Raul L. Lovett, Esq., and *Marc Gursky, Esq.*, (*Lovett, Morgera, Schefrin & Gallogly*), of Providence, RI, for Charging Party Machinists.
Richard A. Skolnik, Esq., of Providence, RI, for Charging Party Engineers.

DECISION

Findings of Fact and Conclusions of Law

I. The Unfair Labor Practice Charges

BENJAMIN SCHLESINGER, Administrative Law Judge: On November 5, 1981 Charging Party District Lodge 64, International Association of Machinists & Aerospace Workers, AFL-CIO ("Union") filed an unfair labor practice charge in Case No. 1-CA-19,224 alleging that Respondent Brown & Sharpe Manufacturing Company violated Section 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. Sec. 151 et seq., by refusing to bargain in good faith with the Union. The charge stated that: "[O]n or about September 4, 1981 and continuing since, [Respondent] engaged in an anti-union animus campaign by regressive bargaining, by refusing to discuss wages and major economic benefits unless and until other proposals calling for reductions in previously enjoyed seniority benefits . . . and union representation rights had been resolved . . . [and Respondent] bargained in bad faith designed to preclude acceptance of a collective bargaining agreement between the parties, refused to negotiate on [Respondent's] 'absolutes,' circumvented the Union's elected bargaining agents, [and] dealt directly with the employees, for the purposes of undermining the Union's majority status with its membership."

On December 28, 1981 the Acting Regional Director of Region 1 refused to issue a complaint. His dismissal letter stated, in part, as follows:

> [W]ith respect to the allegation that [Respondent] engaged in regressive bargaining, I conclude from the investigation that there is no evidence that [Respondent] made proposals for revisions in the contractual provisions regarding job and departmental seniority and job transfers and reassignments for the purpose of frustrating or impeding the collective bargaining process. Rather, it appears from the investigation that although these proposals may have been unpalatable to the Union, they were nevertheless advanced by [Respondent] only because of the lawful business consideration of attempting to increase production and achieve other lawful ends.
>
> With respect to the allegation that [Respondent] refused to discuss its own proposals, or "absolutes", the evidence revealed in the course of the investigation does not support the allegation. Rather, it appears from the investigation that those items were freely and frequently discussed by the Union and [Respondent] at various times in the negotiations.

The Union appealed the dismissal to the Office of Appeals, which on January 29, 1982 denied the appeal for the reasons set forth by the Acting Regional Director.

On October 18, 1981 the employees represented by the Union went on strike, and employees represented by Charging Party Local No. 119, International Federation of Professional & Technical Engineers, AFL-CIO ("Engineers") honored the Union's picket line. On February 17,

1982 the Engineers filed an unfair labor practice charge in Case No. 1-CA-19,567 against Respondent alleging that on or about February 15, 1982 Respondent locked out the Engineers' members who reported to work, sought to require such members to apply unconditionally for reinstatement to employment on an individual basis in violation of the parties' collective rights and collective-bargaining agreement, and failed to negotiate in good faith. On April 8, 1982 the Regional Director dismissed this charge, finding that Respondent could require the employees who honored the picket line to execute written applications for reinstatement. He also found that Respondent could have permanently replaced them. Implicit in that conclusion was a finding that the Union's strike was an economic strike and that the Engineers' members were striking in sympathy with economic strikers. Thus, Respondent did not lock them out or unlawfully deny them reinstatement because it had replaced many of them and there was no work available for the remainder of them. The engineers filed no appeal from the Regional Director's refusal to issue a complaint.

The Union filed a new unfair labor practice charge on June 14, 1982 in Case No. 1-CA-19,958. On July 29, 1982 the Regional Director refused to issue a complaint regarding the allegation that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally implementing in April and May 1982 various changes in working conditions. He found that negotiations for a renewal contract were at impasse when Respondent announced and implemented these changes, which were reasonably encompassed within its pre-impasse proposals. That was based in part upon the findings in Case No. 1-CA-19,224 and

Case No. 1-CA-19,690 that Respondent did not engage in bad-faith bargaining. The latter case involved another charge filed by the Union on March 18, 1982, alleging that Respondent violated Section 8(a)(1) and (5) of the Act by engaging in dilatory tactics by refusing to meet and postponing meetings; by engaging in regressive bargaining by repeatedly escalating its contractual demands, withdrawing and then resubmitting proposals, and advising the Union after it had signified agreement to specific proposals that Respondent was reconsidering its demands; by proposing that employees hired since the strike be given a different seniority listing from its regular employees; by placing a deadline on its latest offer; and by threatening to refuse to meet with the Union. The Acting Regional Director dismissed this charge on April 28, the Union appealed, and the Office of Appeals denied the appeal on June 16, 1982.

The Regional Director also dismissed the allegation in Case No. 1-CA-19,958 that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to negotiate the terms of the entire agreement and insisting on discussing only the proposed subcontracting of work by Respondent. Respondent settled the remaining allegations of the charge by informally agreeing that, in the absence of a bona fide impasse, it would not make unilateral changes of wages, hours, or working conditions provided for in its expired collective-bargaining agreements with the Union and agreed to rescind and give no further effect to certain changes it made in May 1982 and thereafter. The Union appealed from that settlement and the Regional Director's dismissal of the remaining allegations of the charge.

All these proceedings were reviewed after the Union filed a new unfair labor practice charge on September 29, 1982 in Case No. 1-CA-20,283. There, the Union charged that Respondent had continued to refuse to bargain in good faith, as follows:

> Since on or about July 30, 1982 the Union became aware that prior to the commencement of negotiations Mr. David Waterman, former Industrial Relations Director for [Respondent], was terminated by [Respondent] for refusing to carry out a bargaining position designed to preclude reaching agreement with the Union in collective bargaining, by means inconsistent with and in violation of the National Labor Relations Act.

Almost a year later, on September 27, 1983, the Office of Appeals sustained in part and denied in part the Union's appeals, as follows:

> Based on newly-discovered evidence produced during the supplemental investigation ordered in Case No. 1-CA-20283 on February 8, 1983, it was concluded that the dismissals of Cases Nos. 1-CA-19224 and 1-CA-19690 should be reconsidered, *sua sponte*. *Winer Motors, Inc.*, 265 NLRB No. 185, *California Pacific Signs, Inc.*, 233 NLRB 450. After a full consideration of all of the evidence presented in Cases Nos. 1-CA-19224, 19690, 19958, 20283, and 20508, it was concluded that [Respondent's] conduct during the collective bargaining negotiations commencing in September 1981 raised Section 8(a)(1) and (5) issues warranting Board consideration based on record testimony developed at a hearing before an Administrative Law Judge. Inasmuch as there is reasonable cause to believe that the

> strike which commenced on October 18, 1981 was an unfair labor practice strike, *ab initio*, it was deemed unnecessary to determine whether the unfair labor practices alleged in Case No. 1-CA-19958 converted the strike at that time. In view of our determination that the strike was an unfair labor practice strike, the settlement in Case No. 1-CA-19958 was deemed inadequate and the Union's appeal thereof is sustained.

The broad complaint in this proceeding followed on December 7, 1983.[1]

II. The Parties; Jurisdiction

Respondent's answer admits, and I find, that it is and has been at all times material herein a Delaware corporation with its principal office and place of business at Precision Park, Town of North Kingstown, County of Washington, and State of Rhode Island ("North Kingstown facility"), where it engages, through its two divisions – machine tools and industrial products – in the manufacture, sale, and distribution of precision machine

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[1] The other relevant docket entries are as follows: The unfair labor practice charge in Case No. 1-CA-20,291 was filed on September 30, 1982; the charge in Case No. 1-CA-20,304 was filed by Local Lodges 1142, 1088, and 883 of the Union on October 4, 1982; and the charges in Case Nos. 1-CA-20,508 and 1-CA-21,560 were filed by the Union on December 8, 1982 and November 10, 1983, respectively. The complaint was amended by the Acting Regional Director for Region 1 on December 29, 1983 and was later amended at the hearing, which commenced on January 30, 1984, was held in Providence, Rhode Island on various dates in 1984-1985 and 1987-1988, and concluded on January 19, 1988.

tools and related products. Respondent also, until December 22, 1982, maintained another division at Greystone, in the Town of North Providence, County of Providence, and State of Rhode Island ("Greystone facility"). In its operations, Respondent has caused large quantities of metals, steel, tools, and instruments used by it in the manufacture of precision machine tools to be purchased and transported in interstate commerce from and through various States of the United States other than Rhode Island and has caused substantial quantities of precision machine tools to be sold and transported from its facilities in interstate commerce. During 1981 and 1982 Respondent sold and shipped goods valued in excess of $50,000 directly to points outside Rhode Island. I conclude, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Since in or about 1947, Local Lodges 1088 and 1142 of the Union have been and are, by virtue of Section 9(a) of the Act, the certified exclusive collective-bargaining representative of the following-described unit for collective bargaining about rates of pay, wages, hours of employment, and other conditions of employment, which unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees of Respondent employed at its North Kingstown and Greystone facilities, exclusive of clerical employees, employees represented by the Engineers, guards and all supervisors as defined in the Act.

Since in or about 1953, Local Lodge 833 of the Union has been and is, by virtue of Section 9(a) of the Act, the certified exclusive collective-bargaining representative of the following-described unit for collective bargaining about rates of pay, wages, hours of employment, and other conditions of employment, which unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All clerical employees of Respondent employed at its North Kingstown and Greystone facilities, exclusive of production and maintenance employees, employees represented by the Engineers, guards and all supervisors as defined in Section 2(11) of the Act.

Respondent has recognized the respective Local Lodges in successive and separate collective-bargaining agreements, one series for its production and maintenance unit, another for its clerical employees, the most recent agreements being effective by their terms from October 18, 1979 to October 18, 1981, and all agreements having been negotiated by the Union on behalf of and as agent for its Local Lodges. I conclude, as Respondent admits, that the Union, its Local Lodges 883, 1088, and 1142, and the Engineers are labor organizations within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. Preliminary Matters; Section 10(b)

On July 29, 1981 the Union on behalf of its Local Lodges requested bargaining for new agreements, and bargaining began on September 4, 1981 and continued

until October 18, 1983. From the content of the unfair labor practice charges quoted above, one need not divine that bargaining was very difficult. However, before even arriving at the point of possibly boring the reader with who said what at each of the bargaining sessions that are involved in this proceeding, I must answer the General Counsel's and the Union's briefs which attack Respondent's bargaining strategies from their inception.

At the opening of the hearing, Respondent moved to dismiss numerous paragraphs of the consolidated complaint based on Section 10(b) of the Act, which provides in relevant part:

> [N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made.

Respondent argued that then General Counsel William Lubbers had no authority two years later to reinstate the charges, because the early unfair labor practice charges had been dismissed, no appeal had been taken by the Engineers, and the dismissals of the Union's charges had been appealed to and denied by the Office of Appeals. However, I found that he did have authority. *California Pacific Signs, Inc.*, 233 NLRB 450 (1977), upon which he relied, rejected a respondent's contention that Section 10(b) barred the reinstatement of a dismissed charge based on newly discovered evidence. The Board stated, at page 451:

> Section 10(b) of the Act provides that no complaint shall issue based on any unfair labor practice occurring more than 6 months prior to

the filing of a charge with the Board. This section, however, relates only to the actual filing of charges and, once a charge has been timely filed, the control over, and disposition of, that charge is vested exclusively with the General Counsel pursuant to Section 3(d) of the Act. The General Counsel thus has virtually unlimited discretion to proceed on such timely filed charges as he deems fit[4] and, in the absence of a

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[4] See *Silver Bakery Inc. of Newton*, 150 NLRB 421 (1964).

Winer Motors Inc., 265 NLRB 1457 (1982), which expressly overruled *Silver Bakery*, also appeared to support the General Counsel's authority. There, the Board held that the Regional Director could not revoke her earlier approval of the withdrawal of a timely filed charge after the Section 10(b) six-month period had expired, but stated, at pages 1457-1459:

> . . . [W]e are guided by the board's longstanding recognition of the proviso in Section 10(b) as being a 6-month statute of limitations. Where such a clear limitations period has been created by Congress, we find that the Board exceeds its authority to allow the General Counsel to ignore such a limitations period on equitable grounds. In reaching this conclusion, we agree with the First Circuit's assessment when it denied enforcement of our Order in *Silver Bakery* [351 F.2d 37 (1965)] that reinstatement of charges beyond the 10(b) period based on equitable considerations was created out of whole cloth and that:
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> > From the standpoint of respondents, for whom Section 10(b) was enacted, we can think of no good reason why the mere filing of a charge which is withdrawn with the consent of the Board, so that no proceedings are pending, should leave in the Board a roving discretion to determine that so-called equities warrant the reinstitution of the proceedings without limit of time. The fact that the Board may feel that its

showing of abuse of the discretion, the Board will not interfere with General Counsel's exercise thereof.

> discretion is benignly exercised cannot answer the clear purpose of a statute of limitations. [351 F.2d at 39.]
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> * * *
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> . . . [W]here a respondent fraudulently conceals from a charging party the operative facts underlying a violation of the Act, the limitations period does not begin to run until the charging party knows or should have known of such operative facts.[12] Such a rule, however, clearly has no application to the case before us where the alleged discriminatees were not ignorant of the alleged violation within the limitations period. Further, we take issue with out dissenting colleagues' position that our decision here unduly rewards respondents for deceiving the General Counsel concerning the motive for or nature of its misconduct. It is a rare case where a respondent agreed with a charging party's assessment that respondent engaged in conduct violative of the Act. Rather, in most cases, respondent denies the misconduct alleged or proffers an explanation, and the General Counsel must decide if the evidence is sufficient to sustain the charging party's position. If so, the General Counsel issues a complaint; if not, he dismisses the charge. In other words, the denial of the misconduct by the respondent should not be and is not dispositive of the charge . . . [Footnotes 7 and 13 omitted.]

[12] *Local 825, International Union of Operating Engineers, AFL-CIO (Building Contractors Association of New Jersey).* 228 NLRB 276 (1977), cited in the dissent, is a case which turned on the Board's interpretation of the facts, the majority finding that the charging party withdrew his charge in reliance on respondent's false statements concerning its hiring hall rules, and the dissent

Because the Union's and the Engineers' charges were timely filed and had not been withdrawn, and because

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finding that there was no fraud involved and thus no reason to toll the limitations period. This case clearly has no application or relevance to the situation here. In *Local 825*, respondent allegedly gave a false explanation to the charging party as to the reason for his nonreferral which *induced him* to withdraw his charge. Here, the Board investigated the charge, determined that it was lacking in merit, and solicited a withdrawal. That the Respondent did not confess to unfair labor practices during the original investigation but, rather, denied the allegations or profferred an economic defense, does not constitute the type of "fraud" warranting reinstitution of a charge in spite of the 6-month limitation of Sec. 10(b). *N.L.R.B. v. Don Burgess Construction Corporation, d/b/a Burgess Construction, Builders, and Donald Burgess and Verlon Hendrix, d/b/a V & B*, 569 F.2d 378 (9th Cir. 1979), enfg. 227 NLRB 765 (1977); *Pullman Building Company*, 251 NLRB 1048 (1980); and *Plumbers and Steamfitters Local No. 40, United Association of Journeymen and Apprentices of Plumbers and Pipefitting Industry of the United States and Canada, AFL-CIO (Mechanical Contractors Association of Washington)*, 242 NLRB 1157 (1979), cited by our colleagues, are similarly distinguishable. In *Don Burgess*, the charging party union was not aware that Respondent was even employing carpenters, let alone nonunion ones. In *Pullman*, the Charging Party union was unaware that respondent was operating a nonunion jobsite. In *Plumbers and Steamfitters Local No. 40*, the charging party was unaware that his name had been removed from a hiring hall list and the Administrative Law Judge noted that, in such cases, " 'the six month limitation period *does not begin to run* until the . . . unlawful activity . . . has become known to the charging party [Citations omitted.]' *NLRB v. Allied Products Corporation, Richard Brothers Division*, 548 F.2d 644, 650 (6th Cir. 1977)." 242 NLRB at 1161. (Emphasis supplied.) Thus, in all these cases, the 10(b) period was tolled because the charging party did not have reason to believe that an unfair labor practice had been committed and, therefore, had not filed a charge. Our colleagues appear to mistakenly equate these situations with those in

the Waterman charge allegedly contained newly-discovered evidence, I denied Respondent's Section 10(b) motion. There was a second part of its motion: to dismiss those allegations on the equitable ground that the General Counsel's earlier dismissals had led Respondent to assume that the strike was economic. As a result, Respondent claimed that it then hired permanent replacements for its economic strikers. Now, Respondent contended, with the change of the General Counsel's position two years later, Respondent might be liable for a most substantial liability to both the permanent replacements and the strikers if I found that the strike was an unfair labor practice strike. I reserved ruling on this part of Respondent's motion. Furthermore, after review of the parties' briefs. I withdrew my prior denial of Respondent's Section 10(b) motion. Instead, I reserved decision on it until I had heard the entire case, so that I could assess whether the General Counsel had, in the words of *California Pacific Signs,* abused his discretion by reinstating the previously-dismissed charges.

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which, as here, the General Counsel has belatedly determined that a complaint should issue on an already-withdrawn charge.

Nor does a denial of allegations previously made constitute fraudulent concealment. See *Dayco Corporation v. Firestone Tire & Rubber Co.*, 386 F. Supp. 546, 549 (D.C. Ohio 1974), affd. *sub nom. Dayco Corporation v. Goodyear Tire & Rubber Company,* 523 F.2d 389 (6th Cir. 1975). Yet as pointed out by the First Circuit in *NLRB v. Silver Bakery of Newton,* 351 F.2d at 39, our colleagues have "created out of whole cloth" an ill-defined standard that would permit the revival of long-deceased charges whenever allegations of equitable considerations are raised.

Respondent filed a special appeal from my ruling, and the Board stayed the hearing in this proceeding. Almost a year later, the Board, acting on the mistaken assumption that I had denied Respondent's motion, reversed my decision and remanded the same to me with instructions to reconsider it in light of its then two-week old decision in *Ducane Heating Corp.*, 273 NLRB 1389 (1985), enfd. mem. 785 F.2d 304 (4th Cir. 1986), which severely limited *California Pacific Signs* and much of the rationale of *Winer Motors*. This hearing reconvened to receive testimony solely on the issues raised by *Ducane Heating*.

Ducane Heating involved the revocation of a prior dismissal of a charge based on evidence newly discovered after the Section 10(b) period had expired. The Board found no substantial distinction between a withdrawn unfair labor practice charge, as in *Winer Motors*, and one that had been dismissed, and refused to permit the reinstatement of any charge "outside the 6-month limitations period of Section 10(b) absent special circumstances in which a respondent fraudulently conceals the operative facts underlying the alleged violation. Where there is a fraudulent concealment, the limitations period begins to run when the charging party knows or should have known of the concealed facts." 273 NLRB at 1390. I now restate and reaffirm the Order I issued.

1. The Earlier Dismissal of Portions of the Complaint

In preparation for the collective-bargaining negotiations in 1981, Respondent formed a steering committee

which examined various provisions of the then subsisting collective-bargaining agreements, assessed their importance to the parties, decided whether Respondent should propose changes, and predicted what would be the Union's reaction to those changes. Subcommittees prepared position papers and the steering committee held meetings and kept minutes. Central to the complaint's allegation of surface bargaining was that, among other things, Respondent insisted that certain "absolutes" – proposals which dealt with the issues of job preference and machine seniority and mandatory transfers of employees – had to be contained in any new agreement.

It was only after the Union filed the Waterman charge (Case No. 1-CA-20,283) and Waterman complied with an investigatory subpoena, that the General Counsel developed a new theory: Respondent's management personnel had examined and analyzed these proposals in preparation for collective bargaining and initially deemed them to be insignificant to Respondent's operation of its business. However, they also opined that the Union would find the proposals so touchy that, if Respondent failed to withdraw them, the Union would strike, a result which, both the General Counsel and the Union contend, Respondent desired. Thus, Respondent deviously induced the Union to strike over contractual provisions which were meaningless to Respondent but were of greatest importance to the Union – all to rid itself of the Union.[2] The alleged proof, the "smoking gun," consisted

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[2] Although not determinative of the motion or this proceeding, it is fair to note that Respondent counters this argument by contending that its initial position was rejected

of the steering committee's minutes and position papers. These were, in the words of the General Counsel's letter, quoted above at pages 3-4, the "newly discovered evidence."

If that characterization was correct, *Ducane Heating* dictated that I grant Respondent's Section 10(b) motion, because newly-discovered evidence was no longer legally sufficient to justify reconsideration of closed proceedings and dismissed charges. The General Counsel and the Union, therefore, had to make an argument different from the one relied upon by General Counsel Lubbers. Their argument, tailored to *Ducane Hearing*, was that Respondent fraudulently concealed the existence of the documents during the course of the Region's investigation of the early unfair labor practice charges. I held that a respondent, including Respondent herein, has no obligation to cooperate with the General Counsel is the investigation of an unfair labor practice charge. It may supply no information whatsoever, if it so desires. It may merely state its position, without providing sworn statements or witnesses who will be interrogated under oath; or it may choose to cooperate and provide requested witnesses to answer all questions. But, as the Board noted in *Winer Motors*, invariably a respondent will deny the commission of any unfair labor practice; and that alone does not constitute "fraudulent concealment."

In this proceeding, Respondent produced witnesses who sought to convince and persuade the Region's field

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after further study and review and that it truly and in good faith believed that the "absolutes" were of utmost importance to its continued, successful operations.

attorney that it did nothing wrong and, more specifically, that it bargained in good faith. It provided, as requested, bargaining notes, correspondence, and the proposals and counterproposals. It described what occurred at the negotiations and its reasons for taking the positions that it did. When asked what the term "absolutes" meant. Respondent answered and related what it applied to and why it was applied. Although it made no mention of any position papers, the Union had made the field attorney aware of the existence of the steering committee by the Union. Because the "absolutes" constituted the core of the dispute, I could not excuse his failure to ask Respondent for all documents which related to the "absolutes" or to the steering committee. If Respondent had answered that there were none, its response may well have constituted a fraudulent concealment. *Kanakis Co.*, 293 NLBR No. 50 (March 24, 1989). But there was no demand, and there was no duty imposed upon Respondent to produce position papers or the steering committee's minutes or anything else, unless the field attorney made that demand.

Fraudulent concealment involves a duty to reveal an operative fact. In his brief opposing Respondent's motion, the Counsel for the General Counsel cited *Black's Law Dictionary*, 5th ed., West Publishing Co., to define the term as "The hiding or suppression of a material fact or circumstance which the party is legally or morally bound to disclose. . . . The test of whether failure to disclose material facts constitutes fraud is the existence of a duty, legal or equitable, arising from the relation of the parties; failure to disclose a material fact with intent to mislead or defraud under such circumstances being equivalent to actual 'fraudulent concealment.' " The Counsel for the

General Counsel and the Union cited many decisions supporting their view that somehow Respondent had a duty to reveal the existence of the minutes and position papers. I found none of them helpful. Rather, there has been no showing whatsoever that Respondent had a duty to reveal anything.

A concealment, if any, must be fraudulent. There was no proof that Respondent committed any fraud. There was no misstatement, because the important questions were never asked and the pertinent information was never demanded. All that was present was Respondent's failure to tell the field attorney about minutes and papers which might have contradicted the bona fides of its position that it truly desired the "absolutes," rather than proposed them solely as a means to create an impasse and cause a strike. However, as the Board said in *Winer Motors*, it is a rare case where a respondent agrees that it has violated the Act and it is typical that a respondent denies a violation and proffers an explanation for its conduct. If this were a Section 8(a)(3) discharge case, the General Counsel would have the Board authorize reinstatement of a charge anytime she later finds some new or additional evidence that an employer was motivated by the employee's union activities. There is no doubt that such evidence is newly discovered, but *Ducane Hearing* no longer permits that to justify the reinstatement of a charge. There must be a fraudulent concealment, and that, I found, was lacking in this proceeding.

Accordingly, I dismissed the allegations of the complaint which were based upon the unfair labor practice charges filed and later dismissed in Case Nos.

1-CA-19,224, 1-CA-19,567, and 1-CA-19,690. One dismissed allegation was that the strike was an unfair labor practice strike *ab initio*. The Union's allegation in Case No. 1-CA-19,958 that the strike was converted to an unfair labor practice strike had not been considered. Therefore, I gave the General Counsel the right to move to amend the complaint to encompass allegations arising out of the charges which were to subject to Section 10(b) of the Act. I also gave the parties the right to move for reconsideration of the scope of my Order. Only Respondent did so. I denied Respondent's motion, but I restated my intention to consider the remaining allegations of the complaint only to the extent that they occurred within six months of the filing of any surviving charge. I specifically noted that there was nothing that prohibited the parties from introducing the newly discovered evidence, as well as other evidence, as background to the charges which remained in the complaint. *Rikal, Inc. v. NLRB*, 721 F.2d 402, 405 (1st Cir. 1983). The General Counsel, the Union, and the Engineers requested the Board to grant special permission to appeal from my Order. The Board denied permission.

2. The Scope of This Decision

Almost the entire brief of the Union is premised on its request that I decide this proceeding as if I never granted Respondent's motion. The General Counsel's brief contends that Respondent engaged in surface bargaining from the commencement of negotiations and that

the Union struck to protest that unfair labor practice.[3] Explicit in the Union's brief and implicit in the General Counsel's is a request that I disregard my *Ducane Heating* Order. I decline to do so. To rule otherwise not only would disregard what I have held to be Board law but also would undermine the Board's refusal to permit the parties to appeal.[4]

The Board knew, at the time I reserved judgment on Respondent's Section 10(b) motion, that it had *Ducane Heating* under consideration. In what all must agree was an unusual action, the Board stayed the hearing in this proceeding in the middle of a trial day. The Board vacated the stay when it reversed my Order, which the Board believed denied Respondent's Section 10(b) motion; and the Board directed that I reconsider the motion based on its then recent *Ducane Heating* decision. Thus, the Board must have thought that the resolution of the Section 10(b) issue was important enough not only to interrupt the hearing but also to redirect the focus of the hearing to at least a partial disposition of the proper scope of the complaint.[5] Indeed, when I dismissed a

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[3] This is utterly inconsistent with her contention that, because of my *Ducane Heating* ruling and the Board's denial of her request for special permission to appeal, she would not address the allegation that the Union's strike was an unfair labor practice strike from its inception.

[4] The Board's Order permits the parties to renew their discontent with my *Ducane Heating* Order by filing exceptions to this Decision, so the Board has by no means left the General Counsel and the Union without a remedy.

[5] Respondent's reply brief to the Board on its original request for special permission to appeal to the Board made that

major portion of the complaint, and the parties requested special permission to appeal, the Board did not hold that I erred. It assuredly was aware that I did not intend to find violations on any allegation that was time-barred, and it did not direct me to consider the allegations which I had dismissed. In these circumstances, I will neither reverse myself nor consider issues which are no longer before me.

Thus, the complaint does not allege that the Union's strike was an unfair labor practice strike from its inception. It alleges only that the strike was prolonged by the unfair labor practices which remain in the complaint. Furthermore, because the strike started well outside the Section 10(b) period, Board law does not permit me to find that the strike was an unfair labor practice strike. *Greenville Cotton Oil Co.*, 92 NLRB 1033 (1951), affd. sub nom. *American Federation of Grain Millers v. NLRB*, 197 F.2d 451 (5th Cir. 1952). Therefore, I must find that the employees' strike against Respondent was an economic strike. If the strike was prolonged by Respondent's commission of unfair labor practices, the strike, as alleged in the remaining portion of the complaint, would then be converted into an unfair labor practice strike.

My initial point of reference is about February 28, 1982, because that is six months before the filing of the

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point: "Respondent must endure weeks of what may well be unnecessary hearing before the Administrative Law Judge, must affirmatively defend against time barred charges, and will continue to be exposed to contingent liability of awesome proportions."

first unfair labor practice charge which survived Respondent's Section 10(b) attack and is a convenient date to begin to detail the parties' negotiations. However, because the complaint alleges not only surface bargaining but also unilateral changes, it is still necessary to summarize the earlier negotiations to understand that the parties were not in agreement on February 28, 1982; what areas were in dispute; how the parties perceived of the possibility of reconciling their positions; how the parties had treated their proposals and how they had revised them or remained adamant; and how all these facts affected the right of Respondent to make the unilateral changes in terms and conditions of employment and engage in other conduct that, the General Counsel contends, caused the strike to be converted into an unfair labor practice strike.

B. The Early Negotiations; The Absolutes; The Strike and the Unresolved Issues

The negotiations between the Union and Respondent began on September 4, 1981, when the Union proposed increases to practically every provision of the collective-bargaining agreement,[6] what may be charitably

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[6] Although two agreements are involved, one for the production and maintenance unit and the other for the office clerical unit, I will refer to both as one agreement because there is no useful purpose for differentiating between them. Furthermore, I will not differentiate between the negotiations for the two units in September and early October, which were held separately, because the nature of the proposals and the discussions at the separate negotiations were substantially the same.

characterized as a "soup to nuts" wish list for higher wages,[7] double time, triple time, more holidays[8] and sick days, improved vacation and other benefits, better medical, dental, and life insurance, better pensions,[9] severance benefits, eased eligibility for benefits, increased shift differentials, simplification of the arbitration procedure, additional Union stewards, and the like. Perhaps historians of the labor movement in the United States will look upon the Union's proposals as the norm for the first full year of the new Reagan administration. Workers had become accustomed to demanding more and more benefits and higher and higher wages – and generally getting much of what they wanted – but the new Republican administration, starting with its response to the air traffic controllers' strike, evoked some new thinking by industry, and these negotiations, although not necessarily the harbinger of a tougher attitude which was to prevail during the next seven years, if not more, represented something profoundly different.

Management, too, had its wish list of takeaways, a word that may not have been as familiar in 1981 as it is today. As negotiations proceeded, it should have become evident that Respondent's list had not been proposed, as

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[7] The Union proposed a 13 percent wage increase in each of the two years of its proposed agreement, together with a cost-of-living clause.

[8] This, at least, appears to be the effect of the Union's demand that a holiday which falls on Saturday would be celebrated on the preceding Friday.

[9] The pension plan provided a benefit of $9 per month per year of service. The Union sought an increase to $11 in the first year of the agreement and $12 in the second.

often happens, solely as a bargaining device to persuade the Union to reduce or drop some of its demands. This time, Respondent made some of its proposals with the expressed intention of not withdrawing them.[10] On September 18, Richard Jocelyn, Respondent's principal negotiator, prefaced his presentation of proposals by noting the less than vigorous state of Respondent's business and certain of its product lines, analyzing the wages and workers' productivity during the expiring agreement, and stating that it was his objective to reduce inefficiencies and increase flexibility to permit Respondent to meet its competition and face the next ten years. He threatened that these negotiations were the most serious since 1967, when Respondent successfully negotiated the elimination of the incentive system, but he added that Respondent did not intend to offer a small raise – wages were not going to be an issue. Among his written proposals were Respondent's right to establish working schedules without any limitation, to establish and change starting times of employees, and to require junior qualified employees to work on holidays and during Respondent's annual vacation and Christmas shutdowns.[11] Respondent wanted the ability, if there were a layoff, to offer an employee other work and did not want to be required, as

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[10] I recognize that the original complaint alleged that Respondent proposed certain provisions, which it knew were predictably unacceptable to the Union, with the fixed intention of frustrating agreement, as part of its surface bargaining conduct. For whatever purpose, illegal or legal, Respondent wanted certain of these proposals in its new agreement.

[11] An employee could take time off later by mutual agreement between Respondent and the employee.

it then was, to give five days' notice. It wanted to be able to accept the offer of a senior employee to be laid off before a junior employee, without having to seek the consent of the Union. It wanted to eliminate the requirement that it had to conduct time studies whenever an employee claimed that the work standards were inaccurate and the Union's shop steward agreed.

Jocelyn had two other proposals, not yet written. These became the major obstacles to an agreement. The first was that Respondent could require employees to accept temporary transfers, and they need not consent to the transfers, as in the past. The second was the abolition of machine seniority, job preference,[12] and permanent job assignment. Although these terms had a different significance years before, when Respondent maintained an incentive pay system,[13] they meant that an employee had the right to exercise seniority to obtain an assignment to a

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[12] The distinction between machine seniority and job preference is simply one that pertains to the different bargaining units. Machine seniority was a seniority right in the production and maintenance agreement, whereas office clericals were entitled to job preference. Otherwise, the principles were the same.

[13] Certain machines offered greater opportunities for employees to exceed the established standards, and the assignment to those machines was traditionally a perquisite of seniority. Without incentive pay, these jobs were still more attractive to the older employee because, although they required more mental and visual skills, the machines were physically easier to operate. Probably, the more senior employee did not have to work as hard in order to meet the time study for his machine and could thus be protected from any disciplinary proceedings based on lack of production.

specific job or machine, and that machine could not be operated by another employee. The employee assigned to the machine could not be assigned to a different machine even temporarily, unless the employee's assigned machine remained idle during the transfer. The initial reaction of Robert Thayer, the Union's principal spokesman, was that Respondent's proposal was regressive, and he was bothered by its tone, which appeared to charge the Union with being the sole obstacle to full production. Respondent ought, instead, to be looking for more Union participation, instead of making proposals which permitted employees to make their own decisions without Union participation.

Negotiations on the job preference and mandatory transfer proposals continued without appreciable progress. Repeatedly, Thayer claimed that there was no need for Respondent's proposals because the Union had always cooperated with Respondent and that, unless Respondent could demonstrate to the Union's satisfaction why the charges were needed, he would not agree to the proposals. Thayer testified that Respondent never told him why these new proposals were needed. Jocelyn denied that this was so. He testified that he called Thayer's attention to specific past problems[14] and often told Thayer that Respondent wanted the flexibility to assign those whom it wanted to particular jobs, to change assignments, and to require its employees to work when Respondent wanted, and not when the Union consented

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[14] For example, Jocelyn argued that employees in some instances had negotiated special deals as the price for agreeing to transfers.

or the employees condescended to do so. In addition, Jocelyn argued that these were proposals which management felt it needed, and, rather than Respondent having to prove why it wanted these proposals, the Union had to show the possible harm which would be done to it and the employees, weighed against the benefits of what Respondent believed would result in the effective operation of its business. The concepts had to be included in the collective-bargaining agreement, Jocelyn said. It was the Union's responsibility to propose language which would protect the employees and eliminate any realistic problems which the Union foresaw.

Whatever one may think of these respective positions, it cannot be denied that the negotiators were completely at odds over the job preference and machine seniority and mandatory transfer issues, which Jocelyn ultimately termed absolutes, provisions that Respondent had to have. Throughout the remaining negotiations, Respondent maintained that position, although on occasion it refined its proposals to meet specific objections which Thayer raised.[15] In like fashion, throughout all

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[15] For example, Respondent limited the mandatory transfer proposal to temporary transfers of up to 30 days, only where necessary. It agreed that no employee would suffer a loss of pay; and, when a transfer was to a higher-paying position, the employee would be paid the higher rate. Respondent would not transfer an employee to a higher seniority group where there was a layoff, except when Respondent required an employee to fill in for someone who was temporarily absent. By the commencement of the strike, Respondent's demand had narrowed to its use only when a request for volunteers was unsuccessful. Respondent limited its job preference proposal to apply to assignments only within the same labor grade and shift and only to maximize efficiency and for good business reasons.

negotiations, Thayer resisted any agreement which would diminish the right of the employees to select their jobs and machines and retain them. Respondent's proposal was a "[c]lear strike issue" and was "not attainable despite the money" that Respondent might offer. The Union was "rigid in this area."

These were not the sole issues separating the parties. There was another, which Jocelyn had identified as a strike issue, that was equally offensive to the Union. Respondent wanted to change the basis for the calculation of pension benefits. The present plan provided that employees would be paid a flat amount for each year of service. Jocelyn proposed to change this by paying the employees amounts based upon their labor grades, so that employees with higher pay scales would receive greater pensions than lower-paid employees, even though they had worked the same number of years. Thayer found this proposal unacceptable for a variety of reasons, including Respondent's commitment (Thayer represented) in the 1975 and 1979 negotiations that it would never change the present pension plan. Thayer immediately branded it a "strike issue."

When the strike commenced on October 19, 1981, more than these absolutes separated the parties. The parties had discussed a myriad of issues. By a few days before the agreement's expiration date, Respondent, in response to Thayer's arguments, had withdrawn many of its original proposals and revised others,[16] but Respondent was very much on the offensive and in control of the

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[16] For example, when Thayer rejected Respondent's proposal to delete time studies, Jocelyn agreed that the Union's

negotiations. That resulted, in part, from Jocelyn's insistence that non-economic proposals be considered and resolved first, and Thayer's lack of strong resistance.[17] Because there was never a meaningful consensus on the absolutes, which were "non-economic," Jocelyn did not offer Respondent's wage proposal (11, 10, and 9 percent increases in the proposed three years of the agreement) and pension proposal (from $9.00 to $9.25-$10.50 in the first year of the contract, depending on the employee's labor grade, to $10.25-$13.00 in the third year) until two days before the contract was to expire.

Thayer did not react immediately to the amounts of the wage increases. Rather, he said that a three-year agreement presented a major problem. Within a day, he realized that he could not find fault with the amounts that Respondent proposed, and his "major problem" disappeared. However, several other proposals, which depended on the length of the agreement, had to be

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president would make the final decision about whether the time study would be conducted. Then, he withdrew his entire proposal on time studies if the Union would assure Respondent that it would ask for a study only when it sincerely believed that a standard was significantly incorrect. Respondent withdrew its proposal to remove the requirement that the Union had to consent before a senior employee's request to be laid off before a junior employee could be granted. In response to the Union's proposal to streamline the grievance procedure, Jocelyn agreed to eliminate one step of five when the grievance involved suspensions and discharges.

[17] Thayer described that the past practice was that Respondent wanted to agree first on non-economics, the Union wanted to discuss economics, and the discussion "just meshed" in a "continuous process."

revised. Because the contract deadline was soon approaching, and with the absolutes unresolved and, to Thayer, unresolvable absent total surrender, Thayer, in the hope of reaching an agreement, agreed to many of Respondent's "final" proposals and withdrew many of the Union's proposals. However, Thayer, in addition to maintaining his opposition to the absolutes, continued to propose increased vacation pay and safety shoe allowance, chiropractic and additional dental benefits, and revision of the arbitration procedure. He also proposed to give up wash-up time, provided for in the present agreement, and trade it for two days of sick leave. Finally, he rejected other proposals sought by Respondent, including an increase of the length of the then 90-day probationary period and a revision of the dates for the Christmas shutdown, when the employees customarily took their vacations.

But this brief and incomplete recitation of what remained for further discussion is not a wholly accurate one. Shortly before the strike commenced, Respondent withdrew its offer. On Friday, October 16, Jocelyn announced that he wanted to conclude negotiations by 9:00 o'clock that evening and that, if no agreement had then been reached, Respondent's offer would be withdrawn. Negotiations continued until well past that hour – Jocelyn first proposed Respondent's wage offer at almost 10:00 p.m. – and, finally, at sometime after 2:45 a.m., Jocelyn withdrew Respondent's entire offer, but not before offering to extend the expiring contract for another week to permit additional bargaining, with any agreed-upon wage increase to be retroactive. He also cautioned later that day that the absolutes would remain on the

table one week from then, and the week after that. On October 18, the Union's membership, which was advised of both the Union's and Respondent's last offers, rejected the extension, and the strike began.

C. The Negotiations from October 18, 1981 to February 26, 1982

When the parties resumed negotiations on October 21, 1981, a session which Jocelyn asked to be held to get feedback from the Union's membership, he acted as if his offer were still on the table and invited Thayer to review both his and the Union's final offers and define the areas of differences. From Thayer's perspective, there were still numerous strike issues: the absolutes, the pension plan, the dates for notification to employees that they would have to work during the normal plant shutdowns, and the relaxation of the arbitration procedure. Thayer's proposal to exchange wash-up time for sick days suddenly became a strike issue. The parties were stalemated;[18] and there were hints that the Union's acquiescence in a system to ensure that the employees came to work on time,

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[18] Thayer described his frustration with Jocelyn's attempt to prod the Union into supplying input into the absolutes:

> You can't get creative to put other language. The elimination of machine seniority, is the elimination of machine seniority. You can't address it. You can't say you have a partial elimination of machine seniority. It either is or it isn't.
>
> Which was the same box we were in throughout the year of negotiations. I mean, short of agreeing to it, how can you address it? Other than agreeing to your elimination of machine seniority.

did not leave early from work or for lunch, or arrive late from lunch ("clock ringing"), made during the final stages of negotiations before the strike, would be withdrawn. At one point, Jocelyn said to Thayer that he thought that Respondent's wage offer was sufficient to have bought machine seniority, but apparently the Union did not think so.

A meeting later that month was the occasion for Thayer to vent all his frustrations. The Union had never negotiated economics, had never had a "fair shake" at the table, and had the final proposal "dumped on us." The Union's negotiating committee was not part of any negotiating process. Respondent was a dictator, refusing to discuss and agree upon the demands of the Union and proposing working conditions that Respondent "knew we couldn't accept." Respondent's absolutes constituted an attempt by it to "bastardize the seniority system." It was impossible for the Union to accede to Jocelyn's request to write language that would protect the employees.[19] The reason, Thayer explained, that the Union was on strike was the "erosion of the seniority rights of the people." On specific proposals, Thayer raised one new argument. He objected to the mandatory transfer provision because, as drafted, it put the onus on the Union to agree with Respondent that there was a critical need for the transfer and that a junior capable employee should be transferred.

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[19] Thayer explained to Jocelyn: "Look, you can't disguise the issue, there's nothing that you can do, we can come up with, that changes something that says you lose machine seniority and job preference, and there's no way to disguise it, it's there, it's not going to change, you haven't changed."

The Union would not tell an employee to move when he did not want to.

The Union and Respondent met four times in November. On November 6 Jocelyn, responding, at least in part, to Thayer's contention that Respondent had earlier pledged not to touch the benefit schedules of the pension plan, proposed to grandfather all employees hired before the contract-signing date. Those employees who became covered under the pension plan after January 1, 1976, would be paid pension benefits based on each year of their service. Respondent offered, for a three-year contract, $10-$11-$12, which equalled the Union's last offer before the strike. Those employees covered by the plan on January 1, 1976 would be paid on the same schedule or the newly-proposed benefit by labor grade amount, whichever was higher. Thayer showed no sign that he would agree to this compromise. The parties could agree only on something negative, that they had a new problem: during the strike, Respondent had discharged some employees. Thayer said that he had to obtain a strike settlement agreement which provided for no discharges and no repercussions.

The parties then recessed and returned to discussions that evening, when Thayer presented a counterproposal. Earlier in the negotiations, the Union had sought a union shop provision for its office clerical employees. On October 17, immediately before the strike, Thayer withdrew that proposal. Now he put it back on the table. He also retreated from his offer to give up wash-up time for sick days and his previous tentative agreements prohibiting employees from earning seniority while acting as supervisors and increasing the amounts of shift differentials.

He modified his proposals for bereavement leave, Union stewards, and clock ringing. He also wanted amnesty for all the striking employees and proposed that Respondent reimburse the employees for any insurance premiums they paid during the strike and assume the obligation for all claims which would have been covered had there been no strike. Jocelyn commented that Thayer's new proposal put the parties further apart on 25 items than they were before. On 14 of those, the parties had previously reached tentative agreement. (Thayer agreed at the hearing that, although his new counterproposal adopted some of Respondent's proposals, it cost more and was more favorable to the Union than its proposals just before the commencement of the strike.)

On November 17, Jocelyn made a counterproposal which contained most of the proposals which were offensive to the Union. Thayer said that he still saw as absolutes – not only those proposals that Respondent had said that it had to have but also those proposals that Thayer had said that in no event would the Union agree to – job preference and machine seniority, mandatory transfers, pension plan, Christmas vacation, and the three-year agreement. Thayer described the first two absolutes as being as "dynamite" now as they were five weeks before and said that the Union's strike was not economic but was a matter of survival. The membership had rejected Respondent's pension proposal. The current pension benefits were uniform, the people liked it that way, and not one member wanted to change it.

Less major problems still caused enormous difficulties, even after a month's strike. The parties still bickered over clock ringing to ensure that employees did not

leave for lunch before they were supposed to. They could not agree to the dates when Christmas vacation would be scheduled or to the amount of the shift differentials or the shoe allowance or to the inclusion of root canal therapy in the dental benefits or chiropractic coverage under the health benefit plan. There was also utter disagreement about what should be included in a strike settlement agreement, a dispute which loomed larger each time the parties met. All these disagreements were reflected in a counterproposal which Thayer made later that day.

On November 20, Jocelyn made a new counterproposal which differed from its previous offer in only a few respects, but they were meaningful. He deleted the requirement that the Union had to agree to the mandatory transfer, thus answering Thayer's previous argument that he did not want the Union to participate. Of more importance, he added a provision permitting the Union to block any transfer of an employee simply by filing a grievance against it. After review, Thayer declared that the parties were still 11 issues apart. Commenting on machine seniority and job preference, he said that he had no way to address it: "It either is or it isn't . . . [T]his was something they wanted and [we] didn't." The Union committee did not know how to negotiate with "an absolute requirement"; it appeared to him that the parties were "dead."

On November 23, Jocelyn distributed Respondent's final offer, again with relatively few important changes.[20]

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[20] In making these rather summary conclusions, I do not intend to imply that Respondent was unresponsive to the

The mandatory transfer provision was transferred to the management rights clause and was limited somewhat in its application. However, even the presence of any clause mandating the transfer of any employee without that employee's consent was predictably not going to be agreed to by Thayer, and it was not. To him, it was still "obviously a strike issue." Jocelyn now proposed that the contract terminate on November 25, 1984. When there had been strikes in 1975 and 1979, the expiration dates remained the same as they would have been without the strikes, argued Thayer, who said that the new date compounded the parties' problems. And the discharges of employees for picket line misconduct was "going to be a problem," because Respondent was unwilling to agree on the Union's strike settlement proposal requiring that all strikers be reinstated. In sum, there was, according to Thayer, "no way in hell" that the contract would be approved by the Union's membership. At membership meetings held later that day, the vote for rejection was "overwhelming."

In early December, a few of the negotiators for each side met in an attempt to think of some ideas to resolve the issues raised by the absolutes. One of the approaches was based on a proposal for job ranking made by the Union at the beginning of negotiations. Employees would not be paid by their labor grade for what they did and what machines they operated. Instead, the employees were to be paid based on their knowledge and skills.

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changes sought by the Union. In fact, Respondent made some concessions, although obviously not significant enough to please Thayer.

Thayer's original proposal was contained in a Union contract at a nearby manufacturing plant and provided for workers being paid for their knowledge of some, most, or all jobs. That proposal never received a very favorable reception from Jocelyn, who conducted a brief survey of only 11 of Respondent's approximate 170 seniority groups and computed $137,000 as increased base wages for just that limited number. However, Thayer had frequently contended that job ranking would make unnecessary the contractual protection of machine seniority and job preference.

As a result, Jocelyn proposed to Thayer a concept of job ranking, albeit different from that Thayer had originally proposed. Jocelyn's progressions to higher labor grades would be automatic, based on lapse of time. Eventually, all the workers would reach the highest grade; but what would happen when they obtained their highest level caused this new proposal to go nowhere. In Jocelyn's words:

> The main objection that I got from Bob, to this proposal was our position when a person could do all, there was no more job preference.
>
> When they were doing some or most, we told them we would attempt to assign them the work within labor grade, but when they reached the top grade for their job, there was no more job preference.
>
> He wanted it the reverse: that a person while they were in the first or second step up, no job preference for them because they got reassigned all over the place, to learn their job. When the[y] reached the top they maintained job preference.

Early in the negotiations, Thayer had accused Jocelyn of trying to get job ranking without paying for it. By that, he meant that Respondent could transfer employees anywhere they were needed if it adopted job ranking. Now, he contended that, once an employee knew how to perform all the jobs in the plant and was being paid for that knowledge, he had the right to pick his own job or machine and not perform anything else. It should surprise no one that Thayer's interpretation ended the discussion.

The strike lingered through the end of the year and into 1982, and Respondent began to take a hard look at where it was and where it wanted to be. The employees were not receiving unemployment insurance benefits and would do so for 20 or more weeks, and Thayer admitted to Jocelyn that he was feeling no pressure from the employees to settle the strike. Jocelyn decided to supply that pressure. In early January, Jocelyn advised Thayer that Respondent was seriously considering hiring replacement employees and advised the Engineers, which was conducting a sympathy strike, that it was considering hiring replacements for their members. In order to scare the strikers into thinking that their jobs were in jeopardy, Respondent loaded production equipment on flatbed trucks and shipped the equipment, uncovered, out of the plant and through the picket line. Respondent's officers began to give interviews to the news media, and Respondent telephoned Rhode Island Governor Joseph Garrahy to warn that it had to take serious steps if it were to survive. Finally, Respondent commenced interviewing prospective new employees.

These steps had minimal impact. The Federal Mediation and Conciliation Service ("FMCS") called the parties to a meeting in Boston. The parties never met face to face, but Respondent announced that it was seriously considering hiring replacement employees because the striking employees were seemingly content to receive unemployment insurance benefits and the Union had no impetus to settle. In early February, Governor Garrahy asked Don Roach, Respondent's president, to address him and his representatives and the Union's negotiating committee about the competitive disadvantages which faced Respondent. Roach reviewed Respondent's position, specifically identifying that problems of inefficiencies were involved[21] and had to be solved. The Governor asked if the parties wanted to resume negotiations. Thayer said that he would sleep on it.

On February 14, Respondent published a full page advertisement in the Providence Journal which reproduced a letter previously sent to its employees. The letter warned that Respondent had reached a "fork in the road" and, with no prospect of an early settlement, it had to consider its survival even if that meant hiring replacement employees. (By then, Respondent had already begun hiring replacements for the Engineers.) On February 18, the parties met to negotiate about Respondent's notice that it intended to subcontract certain bargaining-unit work. The meeting was aborted, however, when

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[21] Roach stated that the productivity of Rhode Island workers was 60 percent that of workers in Japan.

Thayer insisted that the negotiations include consideration of a strike settlement agreement and Jocelyn insisted that the subcontracting decision should not be bogged down by and confused with the contract negotiations. On February 22, about 1,000 pickets held a "solidarity day" protest, which resulted in personal injury, property damage, the closing of Respondent's plant, Respondent's injunction action in the Rhode Island Superior Court and filing of an unfair labor practice charge, and, ultimately and of greater consequence to this proceeding, hard feelings and new issues which further complicated the settlement of the dispute between the parties.

D. The Status of the Negotiations; Impasse

By this time, the strike was more than four months old. If the original unfair labor practice complaint were still pending, I would have to determine whether Respondent's violations of the Act caused the breakdown of the negotiations; but I do not have to do so now. All that is before me is the status of negotiations so that I may determine whether future events affected or altered the relationship between the parties and imposed upon Respondent certain legal duties with which it did not comply. I conclude that, as of the end of February 1982, before the relevant six-month period during which unfair labor practices are alleged, the parties were at impasse, and they had been at impasse for some time. The Board defined impasse in *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), enfd. sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C.Cir. 1968):

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations, are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

The negotiations began in September 1981 and the parties met on 10 days, some of them very full days, prior to the strike. The complaint no longer alleges that there was any lack of good faith at that time. The overriding issue that kept the parties apart, and one that was of the greatest importance to the parties, was Respondent's desire to have complete flexibility in its assignment of employees to work, to transfer employees to positions where Respondent needed them, and to require them to work when Respondent desired. Jocelyn represented at the very beginning of negotiations, and he never misled Thayer, that Respondent was not going to sign an agreement without the two absolutes. Conversely, the Union interpreted Respondent's proposals as a full assault on the employees' seniority rights; and some of Thayer's comments, quoted above, demonstrate that he thought that there was no possibility of a settlement which included the absolutes. Indeed, on October 17, Thayer rejected Jocelyn's proposal to extend the agreement for a week, because the absolutes would remain on the table and the Union would never agree to them. Thus, I find that the parties well understood that they were at impasse as early as the beginning of the strike, at least if

they continued to maintain their positions regarding the absolutes, as they in fact did.

Another way of determining whether the parties are at impasse requires an inquiry into the possibility that the parties will change their positions. Is there a "ray of hope with a real potentiality for agreement if explored in good faith in bargaining sessions?" *NLRB v. Webb Furniture Corp.*, 366 F.2d 314, 316 (4th Cir. 1966). Or would additional bargaining be futile? *Alsey Refractories Co.*, 215 NLRB 785 (1974). And would it be fruitless to hold further meetings? *NLRB v. Dell*, 283 F.2d 733, 740 (5th Cir. 1960). Based solely on the absolutes, I conclude that there was an impasse on October 18, 1981. Even if this conclusion were doubtful, surely the parties had reached an impasse by the end of the next four months. There were some negotiations in October and some substantive and productive sessions in November, at least to the extent of agreements reached which avoided some minor disputes. But all the major controversies remained. Not only were the absolutes untouched but also the parties could not even think of a way to approach the problem of meeting some middle road, with each side preserving something. At the end of the November sessions, Thayer took Respondent's final offer to his membership, which rejected it overwhelmingly. No new negotiations were scheduled. The only event of moment in December was the attempt by Jocelyn to think up some new way of approaching the items in dispute. His group came up with an idea, based on Thayer's proposal, but Thayer's quick rejection made it obvious that seniority rights were sacred to him and that he would not bargain them away. Nothing happened in January and February 1982 that

would give anybody hope that there was a better chance of a settlement. With Respondent's threat to employ replacements, the positions of the parties could only harden, and they did. I conclude that by the beginning of any arguably applicable Section 10(b) period, the parties were at impasse. The breach unfortunately grew wider.

E. The Negotiations from February 26 through March 1982

By late February 1982, some of the Union's unfair labor practice charges had been dismissed by Region 1 and were being appealed to the Office of Appeals; the strike had its moments of violence, and Respondent was seeking an injunction (its State court action had been removed by the Union to the federal court); the newspapers were reporting that the Union wanted to resume negotiations; and Romeo Calderone, the Rhode Island Director of Labor, asked the parties to meet with him on February 26. The meeting was held, but the parties remained in separate rooms. Jocelyn told Calderone that Respondent's final offer made on November 23, 1981 would no longer settle the strike, because Respondent had incurred costs of $12 million during the strike. Jocelyn was not even going to make a proposal. If the Union had one, he would listen to it; but he warned that Respondent had learned much from operating the plant during the strike with non-Union personnel, and any settlement had to reflect the lessons learned.

Calderone left to confer with the Union and returned with a written proposal in which the Union agreed to

some provisions that it had not agreed to before. However, regarding the mandatory transfer of employees, there was written next to it "discuss and resolve." To Jocelyn, "after 20 weeks of strike . . . [this] was a non-proposal." Later, Governor Garrahy arrived and told Jocelyn that the Union was prepared to move on the absolutes. Jocelyn could not contain his anger and told the Governor that he was being used or had misunderstood or (and in less polite terms) did not know what he was talking about. Jocelyn asked him to go back to the Union and verify that it was prepared to move. The Governor returned to report that the Union was not so prepared.[22]

I take a brief pause from this narrative to indicate what issues remain in the complaint regarding Respondent's alleged surface bargaining. In a nutshell, not much: of 19 factual allegations relied on as evidence of the unfair labor practice, only 2 remain. Respondent is charged (1) with failing and refusing to make any bargaining proposal from March 28, 1982 through May 1983 and (2) on or about June 25, 1983 with "introducing new, regressive and predictably unacceptable proposals into negotiations." Accordingly, I describe the negotiations solely to make understandable my findings relating to these remaining allegations.

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[22] Jocelyn's testimony about his anger with Governor Garrahy leads me to believe him. In addition, I find that the Union was not prepared to change its views about the absolutes, as in fact it did not for more than a year thereafter. I find that Respondent's Exhibit No. 63 was given to Respondent and that the fifth page attached to General Counsel's Exhibit No. 50 was not given by the Union to Calderone for delivery to Respondent.

On March 2, the United States District Court ruled that it had no jurisdiction over Respondent's injunction action and remanded it to the State court where, after the first hour of hearing that day, the judge instructed the parties to return to negotiations for five days. That prompted some intense, but ultimately fruitless, negotiations which began the next day and ended two weeks later, with the parties in even greater disagreement. It started with Jocelyn's presentation of some new written proposals. One permitted Respondent to require employees to take physical examinations and to transfer employees who were receiving workmen's compensation benefits to different jobs so they would continue to work. Another proposed a ban on sympathy strikes. Another contained several new substantive proposals: (1) supervisors would be permitted to perform some unit work which was incidental to their supervisory duties so that they could perform minor maintenance and could routinely revise standards and methods of operation; (2) there would be a "labor pool" to permit Respondent to assign employees immediately to eliminate bottlenecks in the production system and reduce overtime; and (3) the expiration dates of the agreements for the clerical unit and the production and maintenance unit would be different, the latter expiring on January 25, 1985, after the end-of-the-year shipping rush and when Respondent would have better information on which to base its proposals.

Jocelyn revised one of his earlier proposals. Respondent had learned during the strike that many of the time standards were incorrect. Some were too high; others, too low. Time studies cost money, and it was in the foreman's

interest to ensure that the standards were correct because he was evaluated on the performance of his employees. Supervisors had been running the machines and were familiar with them, and the supervisors would decide whether a time study was necessary or whether the request for a study was made only to harass. Finally, Jocelyn proposed a strike settlement agreement which provided, among other things, that the replacement employees would maintain their employment and that any returning employees had to take physical examinations. To all this, Jocelyn added that he would probably have additional proposals based on Respondent's experience of running the plant during the strike.

Thayer asked Jocelyn whether Respondent's last proposal was still on the table and whether the new and revised proposals were merely modifications of the last proposal. Jocelyn replied that Respondent was no longer willing to settle for what it had previously offered. The Union had no proposals from Respondent, other than the ones that he had just presented. He was preparing language for other proposals. After a caucus, Thayer announced that the new demands gave no signal that good-faith bargaining was going to commence. He requested that Jocelyn withdraw his last proposals so that the parties might discuss and resolve the proposals that originally had created the strike. Jocelyn refused to do so. Calderone opined that the parties were "worse off" than they were at the beginning of the strike. Thayer said that the Union was bargaining in good faith, pointing out that he had dropped his opposition to several of Respondent's proposals on February 26 without even coming to the table. Jocelyn replied that Respondent had learned much

in the last 20 weeks and had developed different methods for getting the work done, such as a team work concept and employees going back and forth between different jobs. There was nothing magical about employees doing other kinds of jobs. Supervisors were running as many as four machines, were moving their own work, and were not killing themselves. They did not need employees from the maintenance department to help them move. Besides, different methods were now warranted: the strike had cost $12 million and Respondent was not quoting orders and not shipping some goods. Thayer contended to Calderone that Jocelyn was just going through the motions. "[B]ased on the proposal they put on the table this morning, how could he ever even conceive that this company was going to try to resolve this thing."[23]

That evening, Thayer began to review where the parties were, identifying the proposals that he thought the parties had agreed upon and one, the amount of the shift differentials, as proposed by Respondent, that the Union was now agreeing to. Jocelyn interrupted and stated that he was still reviewing those proposals, that Respondent had found during the strike that certain

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[23] Thayer had other reactions to Respondent's proposals. The Union was certified for the production and maintenance employees, and there was "no way . . . that they realistically could expect us to give up our rights under that certification and now accept supervisors doing bargaining unit work." It was "inconceivable" to expect that the Union would accept that proposal. The labor pool was a "one-way street," without benefit to the Union. "[T]here's just no way in hell that they could even realistically expect us, with these issues now staring us in the face, to get serious about any kind of resolve. It was all a one way street and it continues to be that one way street."

changes might become useful, and that it might want to make other changes or no changes at all. Jocelyn said that, even on matters previously and tentatively agreed to by Respondent, there was no longer a tentative agreement on anything because of what Respondent had learned during the strike. For example, Respondent now felt that an employee should work the full day before and the full day after a holiday in order to be paid for the holiday, a proposal that Respondent had previously made and withdrawn.[24] Respondent was no longer willing, as it had been before, to agree, as the Union had proposed, that no more than 50 percent of the employees could be required to work during any normal vacation week.

On other matters, however, Jocelyn said either that the proposal tentatively agreed upon was still acceptable or that Respondent was not considering any change of its previous position or that Respondent agreed to a certain proposal, once Thayer had changed the Union's position to an agreement with what Respondent had previously proposed. On yet other issues, such as mandatory transfers, Jocelyn said that Respondent might submit another proposal: "[T]hat one's under active consideration as far as the company was concerned." When the discussion turned to some economic matters, even though there had been a tentative agreement, Jocelyn said that there was none, noting: "You'd better know that the economics is a big issue from here on out because this strike has cost the company a lot of money, and the whole proposal regarding the economics is still up in the air." On still other

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[24] The current agreement provided only that the employee be "in attendance" both days.

proposals, when Thayer agreed to certain proposals, Jocelyn reminded Thayer that he had earlier in the session given a new proposal on that very subject, and the new proposal reflected that Respondent was no longer willing to agree to proposals that it had been willing to accept before the strike.

Thayer argued that by so doing, Jocelyn was digging the hole deeper and deeper, that the negotiations were getting worse, and that Respondent was offering proposals that were regressive. Sometime later, Jocelyn remarked that the only movement by the Union was on the benefit for safety shoes; but Thayer claimed that he had moved on various demands (shift differentials, supervisors' seniority, and sick days) and had not escalated his demands. The only items that the Union was looking for, contended Thayer, was that its strike should not economically hurt the employees. Some employees had continuing illnesses, and the Union still wanted them covered by insurance (albeit at the employees' expense). One employee had died, and the Union wanted to make sure that Respondent still had life insurance. Because vacation pay was a percentage of an employee's yearly earnings, the employees should be credited as if they had worked 40 hours a week during the strike. Otherwise, there would be "a drastic effect on their vacation" pay. The parties resolved none of these demands, and they reached no agreement on any of their respective proposals for a strike settlement agreement, such as retention or termination of replacement employees, recall of strikers, no reprisals, and withdrawal of all unfair labor practice charges.

On March 4, Jocelyn did not have a written proposal, but he began to review certain of the outstanding issues. He sought the Union's assurance that it would continue to cooperate on the issue of employees' starting times. If the Union agreed, he would not offer any new proposals. He agreed to leave intact the proposal that Respondent could require only 50 percent of its employees to work during the normal vacation shutdowns. However, he had a problem making up for the time lost by reason of the strike and wanted the Union to agree in a side letter that Respondent would have the right to work full departments during the August and December shutdowns in 1982. Jocelyn repeated Respondent's earlier position that an employee must work the full day before and the full day after a holiday to be eligible for that holiday. He also said that there might be times that Respondent wanted to move a senior person into another department. Thus, he had problems with the concept, previously agreed to by the parties, that junior employees would be moved. Furthermore, he said that the contract should not restrict Respondent from transferring employees into departments that had layoffs, because Respondent might have to clear bottlenecks immediately, without the necessity of recalling employees from layoff. Finally, he withdrew his earlier proposal that the Union's filing of a grievance would block a transfer. The employees would have to accept the transfer, but the grievance could continue to arbitration. If the Union agreed to this revision, Respondent might be able to avoid the concept of a labor pool.

Jocelyn discussed other matters, such as his new proposal on clock ringing, and defended Respondent's insistence that unit employees were entitled to gain

seniority credit while working as supervisors and that supervisors could do unit work. Thayer questioned whether Jocelyn was serious about the latter demand. The employees would not agree to that provision. The discussion turned to the strike settlement agreement. Jocelyn announced that under his proposal the replacement employees would continue to work and the employees who were discharged for strike misconduct would remain fired. Any standards that the supervisors found were incorrect would be changed. He still insisted on physical examinations, noting that the strike was then 20 weeks old and Respondent would not be held responsible for any injuries that the strikers had incurred elsewhere. He talked about the possibility of the phased recall of the strikers, but said that work had dropped off. Finally, he threatened that he had more proposals in his briefcase, but he would leave them there for the present. However, if the strike lingered, he might want to add more proposals. In the meantime, the parties had enough on the table to discuss.

Thayer complained that, although the Union had proposed a complete contract, Respondent was holding back, with the Union wondering what it was going to add later. If the Union had any hope of reaching an agreement, it had to know all the issues, rather than resolving some issues, only to have Respondent make new proposals. Jocelyn refused to commit himself and reserved the right to add more proposals or modify present proposals at any time. The State mediator reminded Jocelyn that the parties had returned to negotiations under a court order and that the Department of Labor was to report to the judge. Without an offer from Respondent, the mediator did not

know what he had to settle. It was impossible for him to mediate.

Thayer continued to complain that he was bargaining in the dark and that it was impossible to bargain with threats of new proposals or modifications hanging over the Union's head. While the Union had confined itself to its original proposals and had not escalated its demands, Thayer contended that Respondent had made eight new demands, which it knew were so "totally unacceptable . . . that the Union and its membership could never agree . . . and [were] obviously so regressive that [they were] unable for acceptance." Provisions which the Union thought had tentative agreement, Thayer continued, were no longer agreed to; and Respondent was maintaining that it had the right to add more provisions. Thayer thought that the Union knew why it had struck in October 1981, and the reason was Respondent's absolutes. Now Jocelyn was moving the center of the cause of the strike, and the Union was unable to negotiate cogently. Thayer pleaded with Jocelyn to make a complete offer so that the Union could agree to the proposals or disagree with them or at least agree to disagree. He suggested that, without such a proposal, Respondent was not attempting to negotiate but was only sitting at the table because the judge had ordered Respondent to do so.

Calderone and the mediators supported Thayer, contending that they could function only if they knew what the issues were. Jocelyn retorted that the Union had also changed its position, reverting from its previous tentative agreements on clock ringing and that employees earned seniority credit when acting as supervisors. Nonetheless,

Jocelyn assured Thayer that he would not alter his position for five days. Thayer understood that, if no agreement were reached in five days, "all bets were off" and Jocelyn would make additional proposals. Thayer proposed that the parties recess and caucus and put together their entire proposals. Jocelyn replied that he did not know whether he was prepared to do so.

That afternoon, Respondent withdrew its request for an injunction, and so the judge's order to negotiate was no longer effective. However, the parties resumed their negotiations the following day, Friday, March 5, but there was no exchange of proposals. Indeed, little happened, except that Calderone became angry, felt that the mediators were being used, threatened that he would file a report with Governor Garrahy, and called upon the parties to prepare and exchange full proposals. Jocelyn said that he needed time to discuss his proposal with Respondent, and negotiations recessed until Tuesday, March 9, when the parties exchanged complete proposals. The Union's proposal still showed differences on a variety of lesser issues: the length that an employee could accumulate the allotment for safety shoes; the number of days that an answer had to be filed in the second step of the grievance procedure; and the amounts of different dental benefits. The right of Respondent to require employees to take physical examinations was still rejected, as were the no-sympathy strike clause and the expiration dates of the agreements.

However, the Union drastically changed its proposal regarding machine seniority and job preference and mandatory transfers by offering to reduce the then present 118 seniority groups (in the production and maintenance

unit) by classifying them by occupations and no longer by departments. For example, painters in the paint departments in all divisions would be included in the same classification, and there would be seniority in that classification. Now, Thayer explained, if Respondent had 10 painters in the machine tool division and 10 in industrial products, it would have a pool of 20 people whom it could use wherever it wanted at any time, with total flexibility. The Union's proposal included only 23 occupational classifications, and Respondent could assign employees even from the North Kingstown to the Greystone facility, if it felt that it had the need to do so, and assign senior employees before their juniors, or vice versa, without limitation.

Jocelyn prefaced his presentation by stating that Respondent's proposal would remain on the table until March 17. In addition, he noted that a van had recently been blown up, and if there were any other violence, he would not negotiate. Thayer denied knowledge of any such incident. Jocelyn later reviewed each of Respondent's proposals, indicating the tentative agreements and the areas where the parties were still apart in their thinking. Most of the tentative agreements reflected agreements made months before. The disagreements were almost the same as those which had lingered and festered for months, except for those proposals which Jocelyn first proposed in early March.

Much discussion centered on the Union's new proposal for seniority by occupational classification. Jocelyn noted that it would do away with machine seniority, and

Thayer agreed, adding that there would be no job preference either.[25] The Union's proposal, Thayer said, would allow Respondent to move employees wherever Respondent wished. The only possible negative impact would involve layoffs, because Respondent would have to lay off first the junior employee of all the employees in the classification. Otherwise, Thayer contended that his offer encompassed Respondent's labor pool proposal of a week before.[26]

However, Thayer refused to give Respondent all that it wanted. Thayer still maintained that the voluntary transfer provision worked well and he did not want to amend it. Although Jocelyn thought that the occupational grouping was interesting, he contended that Respondent still wanted to mandate a transfer of any employee anywhere, and Thayer's proposal did not fully address mandatory transfers. For example, if all painters were busy, Jocelyn wanted the right to dictate who else should paint. He also said that Thayer's proposal raised problems about overtime assignments (because the contract provided for a form of equalization of overtime, Respondent would have to divide overtime with some equality among the employees in all the divisions, even if only one division had substantial overtime); layoffs (because of the three divisions, the one with the junior employee might

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[25] Thayer had not made a similar proposal for the office clerical employees, but said that, if the concept was agreed to for the production and maintenance employees, a similar concept could be worked out for the office clericals.

[26] Jocelyn's March 9 proposal omitted any reference to a labor pool.

be the busiest and could ill afford to lose an employee); and upgradings (again, the Union's proposal might force Respondent to transfer an employee from its busiest division to one which was not busy.) Jocelyn said that he viewed Respondent's viability not as a company as a whole, but as three separate divisions; and he was not interested in combining them into one seniority group. Finally, he complained that Respondent was satisfied with the general principle of machine seniority, which encompassed specialization on particular machines, and felt that the Union's new proposal would interfere with a worker's skills.

Thayer countered that the essence of Respondent's mandatory transfer proposal was to get rid of departmental and machine seniority and yet, now, Jocelyn was arguing that both were beneficial. Nonetheless, Thayer conceded at the hearing that Jocelyn had never proposed that mandatory transfers would be limited to divisional lines. He conceded that, under the Union's proposal, Respondent could transfer only those employees in the same labor classification. He conceded that one of the disputes still centered on the Union's insistence that transfers outside of the labor classification would still be voluntary, which Respondent wanted to make mandatory. Finally, Thayer also conceded at the hearing that Respondent's proposal afforded Respondent more flexibility than did the Union's.

The discussion then turned to the strike settlement proposals. Thayer still insisted that all striking employees who had preexisting illnesses and those who became ill during the strike receive their medical benefits. He also proposed that Respondent rescind all promotions,

reschedule all missed vacations, and take no reprisals against the employees. He reworded his striker replacement proposal, but it was effectively the same – Respondent would immediately recall all employees, strikers and replacements, by seniority. Thus, the replacements (other than strikers who returned during the strike or employees who never went on strike), who had comparatively little seniority, would be bumped by the strikers who had many more years of service. The result of the Union's proposal would be that most of the replacement employees would lose their jobs and the strikers would be rehired.

After a caucus, Thayer reviewed Respondent's proposals, indicating, as Jocelyn did earlier, where the parties had reached tentative agreements and where the parties differed. The differences were substantial. They included the requirement that employees may receive holiday pay only if they work the full days before and after the holiday; the scheduling of Christmas week, and what particularly riled Thayer was that Respondent had the power to require employees to work on New Year's Eve; Respondent's proposal that it could require employees to work during the normal August and Christmas shutdowns and, at its sole discretion, offer them either time off or pay in lieu of their vacations, without affording the employees any right to choose what they wanted; mandatory transfers, which had become worse because Respondent withdrew provisions requiring it to transfer junior employees before senior employees, prohibiting transfers into departments where there had been layoffs, and blocking transfers when a grievance had been filed; separate expiration dates for

the two contracts; a no-sympathy strike clause;[27] job preference; Respondent's proposal to limit the accumulation of the purchase price of safety shoes for only two years, not a longer period, as the Union wanted; physical examination of all employees;[28] time studies (but the Union now would agree to Respondent's proposal of November 23, 1981); pensions (if the cost of the Union's proposal was the same as Respondent's, why should pensions be an issue, argued Thayer); supervisors doing bargaining-unit work, even with Respondent's newly proposed limitation that supervisors could not work more than 20 percent on unit work in any calendar quarter;[29] a system of seniority that would establish four classes of employees, (1) employees working before the strike who worked during the strike, (2) employees hired during the strike, (3) strikers who had been replaced by other employees after the strike commenced, and (4) unreplaced strikers;[30] increases in the dental plan; changing of standards on machines by supervisors, without any Union participation; and withdrawal of all litigation.

The negotiations for the week ended with Thayer's complaint that Jocelyn was holding a gun to the Union's

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[27] Thayer stated to Jocelyn: "I don't think I have to tell you how far, how much consideration we could give to something like that."

[28] Thayer said: "[T]here is no way that the membership is going to buy that, there is no way that we can even recommend that."

[29] Thayer said: "There was just no way in hell that we could let supervisors do work that we had been certified for."

[30] Thayer said, in "strenuous terms": "[T]here was no way that we were going to agree to that."

head by imposing a March 17 expiration date on his proposal and a general discussion of the Union's labor classification proposal, which Jocelyn thought represented some "good thinking" that he wanted to examine more closely. He stated that he had some concerns, but he would see whether the proposal could be "fine-tuned." The parties discussed the Union's proposal again on March 12. Jocelyn stated that, while he would continue to examine the benefit of combining some of the labor groups, he did not believe that the Union's proposal answered fully what Respondent's mandatory transfer provision attempted to accomplish. Furthermore, the Greystone facility was a separate division, and the employees' skills there were different from the employees' skills in North Kingstown. Thayer contended that his proposal was more beneficial to Respondent than the current contract. For example, if there were a layoff, it was conceivable that one division's most junior employee might have 10 years' seniority; and he would have to be laid off. At another division an employee with only three years' seniority would maintain his job. Respondent would retain more experienced employees by agreeing to the Union's proposal. Jocelyn countered that Respondent invariably found other employment for the more experienced employee who otherwise would be laid off.

Ultimately, Jocelyn said that he could not view the Union's proposal as a substitute for Respondent's proposal of mandatory transfers and the elimination of machine seniority and job preference. Again, Thayer contended that his proposal eliminated machine seniority and that he addressed the job preference proposal by broadening the group entitled to jobs to include all the

skilled employees. Again, Jocelyn argued that, if the groups were broadened, Respondent would have more difficulty in laying off and upgrading employees and equalizing overtime. Thayer said that the parties were getting nowhere and accused Jocelyn of not even thinking about the Union's proposal. The contract was to include Respondent's proposals and nothing else; they were absolutes. Calderone said that, because Respondent had rejected the Union's proposal, he saw no point in continuing to talk about any of the other issues, and he called for a break in the negotiations. He would confer separately with the parties. If he believed that there was a point in resuming, he would try to arrange a meeting.

The parties met on March 17 to discuss Respondent's proposal to subcontract some of its work. Later, however, the discussion turned to the contract negotiations, and Thayer accused Jocelyn of escalating his demands. Jocelyn refused to debate whether his proposals were escalations or new proposals, but stated that they reflected conditions that Respondent now thought would make it more competitive. He referred to the 1975 and 1979 strikes and said that Respondent's resolve was never firmer. One side was merely going to have to persuade the other. Respondent's original demands were still unresolved, and Respondent was prepared to hold to its demands until the economic pressures brought one side or the other to its knees.

That day, after the meeting, Thayer wrote to Jocelyn asking for specific information about Respondent's subcontracting of work, including the costs being quoted by the prospective vendors or Respondent's subsidiaries who were under consideration to manufacture the work.

Despite the complaint's allegation that Respondent did not supply this information to the Union, Thayer testified that he received the names of the prospective vendors and some of their costs. Jocelyn not only exhibited a letter, dated April 30, in which he provided cost information to Thayer but also testified that he orally gave the rest of the information to Thayer at the bargaining table, a position which is partially supported by the Union's notes of the negotiations held on March 28. The General Counsel's brief omits discussion of this allegation, and so I have no guide to what the General Counsel believes was not produced in violation of the Act.[31] In all the circumstances, the General Counsel has proved nothing, and I will dismiss Paragraphs 17(a) and 19(a) of the complaint.

Earlier, the parties had met on March 24 to discuss further Thayer's request for information; and, although the meeting had been called primarily to discuss subcontracting, the discussion also touched upon the general contract negotiations. Thayer stated that Jocelyn had never addressed the Union's proposal. If Jocelyn maintained that Respondent was holding to its absolutes and that they were not negotiable, he should openly say so. The meeting ended with each party accusing the other of escalating the demands. After that meeting, as a result of new alleged incidents on the picket line which resulted

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[31] I requested the Counsel for the General Counsel to submit with his brief a proposed order setting forth all the relief which he was requesting. That may have provided a clue to what material he thought had not been produced. Unfortunately, he failed to do so.

from another "solidarity day" on March 22,[32] Respondent again applied for an injunction. Again, as part of the judge's consideration of the application, the judge ordered the parties to negotiate over the weekend with the help of the State Department of Labor.

So it was that the parties returned to negotiations on March 28. Calderone felt that it was best if the parties abandoned their subcontracting negotiations and returned to the March 9 proposal to discuss and resolve the issues or, at least, to find out where the parties were going. Jocelyn agreed to do so, as long as everyone realized that the March 9 proposal was no longer on the table, that it had a deadline of March 17, and that date had come and gone. A heated argument followed, with Thayer complaining that he could not make progress without a proposal to discuss. Jocelyn said that he could discuss the outstanding issues and, if Thayer did not know them by then, they had nothing to discuss. However, if the Union had a proposal, he would listen to it and discuss it. Thayer said that it was ridiculous; Jocelyn was asking the Union to sit there and bargain against itself. Jocelyn reiterated that his proposal had expired and, despite the mediator's urging, he refused to offer it again. No further meetings were scheduled; and the parties would not meet again for four months, when they met only to discuss subcontracting.

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[32] Jocelyn testified that there were approximately 1,500 pickets who closed down the main road. There was violence: 60 car windshields were smashed, the security shed was incinerated, the Winnebago from which Respondent attempted to videotape the demonstration was disabled, and people were injured and had to be taken to the hospital.

F. The Last Negotiations: 1982-1983

In April 1982 Governor Garrahy contacted the parties and offered to set up a fact-finding commission, whose purpose would be to hear the issues from both sides and arrive at a potential resolution. The parties would not be bound by its recommendations. The Union agreed, but Respondent refused, rejecting what it perceived to be a political settlement of the strike. Accordingly, no commission was established nor was fact-finding conducted. By now, the strike had continued for one-half year, and the parties were further at odds than ever. No negotiations were held in April, and nothing was scheduled in May, but there was some other activity.

On April 6, Jocelyn advised Thayer that Respondent had implemented the wage increase and increases of dental benefits, life insurance, major medical, and safety shoe allowance contained in its November 1981 offer. On May 10, Jocelyn announced to Thayer four proposals, which were contained in the proposal of March 9, 1982, that Respondent intended to implement: eligibility for holiday pay, work during August and Christmas 1982 vacations, 120 calendar days' probationary period, and supervisors doing bargaining-unit work. Thayer did not reply. Jocelyn sent yet another letter on May 17, advising that Respondent intended to implement its March 9, 1982 proposal to correct the incorrect standards found during the strike. On May 26, Thayer responded to both of Jocelyn's May letters and reminded him that he had placed a deadline on his March 9 proposal, which no

longer existed. Thayer wrote that the proposed implementations constituted illegal unilateral changes of mandatory subjects of bargaining and requested "immediate meaningful negotiations." Jocelyn declined on June 1.[33]

In the summer, Governor Garrahy and the State's Congressional delegation asked the parties to meet in Washington, D.C. with Kenneth Moffett, then Acting Director of FMCS. There was a meeting on July 26, but the parties never met face to face. Nor was much accomplished because, although Thayer was willing to discuss his last proposal, he did not want to get "suckered" into negotiating only from his own proposal. He also contended that Respondent not only was unwilling to put its own proposal on the table but also would settle only on its own terms. A month later, on August 26, the parties again met at FMCS, and this time both came to the table.

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[33] Long after the Union had filed its charge in Case 1-CA-19,958 alleging that Respondent had unilaterally implemented its proposals, Jocelyn wrote to Thayer on December 9, 1982 that, despite the earlier notifications, Respondent had not corrected any incorrect standards or implemented its eligibility rule for holiday pay and had complied with past practices regarding assignment of work during vacation periods. Respondent had used "sparingly" the proposal regarding supervisors doing bargaining-unit work, which did not deprive individuals of reinstatement or recall from layoff, and Respondent had terminated employees between their 90th and 120th days of employment. Jocelyn rescinded the implementation of these proposals, said that he was ready to bargain, and agreed to provide the Union with the names of those employees who had been terminated after their 90th day of employment, to entertain any grievance filed on their behalf, and to waive any defense that the employees were probationary.

The Union made a new proposal, which reflected matters tentatively agreed upon in past negotiations and agreements which the Union had not agreed to before, and from which were missing proposals which the Union had previously made but Respondent had consistently rejected. Jocelyn was cautious in his response: although he had read the Union's new seniority proposal, he had not had an opportunity to study it. However, it appeared to be a company-wide seniority provision, which the Union knew in March was not acceptable; and he felt that the new proposal moved the parties even further from what Respondent wanted. Thayer argued that Respondent's subsidiary, which was located in the Midwest, had recently negotiated the seniority system that the Union now proposed. Jocelyn promised to respond to the proposal at the next meeting.

On September 2, Jocelyn responded to the Union's proposal. He noted the absence of any proposals about sympathy strikes and supervisors doing bargaining-unit work. He said that the Union wanted now to eliminate the contract's product cost measurement plan, which Respondent had never proposed and did not want to eliminate. Jocelyn said that the provisions was important to Respondent to gauge employees' performance and to price products. He criticized the Union's proposal for plant-wide seniority as emanating from the contract of a company which not only manufactured one product but also employed only 160 employees, about one-tenth of Respondent's complement. What was workable there, with bumping and job bidding, had no bearing on an operation of Respondent's size, and the proposal moved the parties further apart. Jocelyn argued that Respondent

always had the right to lay off employees, albeit subject to certain rules; but at least employees would be laid off. Under the Union's new proposal, an employee who was laid off would have the right to bump any less senior employee, plant-wide. Under the new proposal, an employee could change his shift every six months. Respondent's employees never had that right. One of the recurring issues of these negotiations was Respondent's proposal that an employee could accrue seniority even while serving as a supervisor. Thayer previously wanted to freeze that employee's seniority, and Respondent rejected that. Now, Thayer's new proposal would have eliminated the employee's seniority after two years. There were other differences, and Jocelyn was astonished that Thayer would even make such an offer.

Thayer replied that he had tried every type of proposal to satisfy Respondent's claim that it wanted flexibility; and, if nothing could satisfy Respondent and if Respondent's proposal remained the same, then the parties were at an impasse. Jocelyn said that Respondent had no interest in company-wide seniority; it preferred departmental seniority; and, because there was a mix of products between the industrial products and the machine tool divisions, he had no desire to move employees between divisions. Jocelyn suggested that both sides look at and possibly rethink their positions and, if anyone thought of any bright ideas, he should contact the mediators.

Apparently, no one had any original thoughts. The strike continued, and the parties met sporadically late in 1982 to discuss particular changes that Respondent was thinking about implementing. On September 9 and 15

they discussed subcontracting and the transfer of work between seniority groups, as provided in the expired agreement. On November 18 they met to discuss subcontracting and the closing of the Greystone facility. They met on December 8, because Christmas vacation was soon approaching, and Jocelyn had notified Thayer that Respondent intended to change the vacation dates and wanted to know whether the Union wished to negotiate. Jocelyn then proposed to close a half-day on December 24, and, if the employees worked the half-day, to pay them for a full day, and the plant would close on December 27-31. Thayer replied that this was one of the Union's strike issues. He was unwilling to negotiate portions of Respondent's withdrawn offer that Respondent, by threatening to implement them, wanted to discuss from time to time. Instead, he felt that Respondent should place a full and comprehensive proposal on the table. Jocelyn refused to commit himself to making such an offer. The rest of the meeting was devoted to Respondent's notice to the Union of its intention to close its Greystone facility. It was later closed.

During the latter part of 1982, the parties also engaged in written communication. By letter dated September 13, Thayer asked Jocelyn for all copies of any transfers normally supplied to the Union under the terms of the expired contract, upgradings of employees, and any letters of termination. It was only after the Union filed unfair labor practice charges and after the investigation of them began that Respondent supplied some notices of transfers and upgradings, but Respondent removed the names of the employees affected by the actions. Before the strike, Respondent had given to the

Union weekly a separation report listing who left its employ, either by quit or termination. Respondent had not given reports to the Union after the strike began; but Jocelyn testified that Respondent had not prepared any reports, and I have no reason to suspect that his testimony is inaccurate.

In a letter dated September 14, Jocelyn replied that the information regarding transfers and upgradings would not be supplied because "that would necessarily require disclosure of the names of employees currently working at the plant." He said that this position had been upheld by the Board's Regional Office, which had approved Respondent's practice of refusing to state the names and addresses of replacement employees, and, since then, Respondent never supplied them to the Union.[34] Respondent, however, supplied reports of discipline, with the names of the employees, when the discipline involved employees who had worked for Respondent before the strike.

The parties did not meet again, except to discuss various of Respondent's proposed changes of conditions of employment, until the summer of 1983. Their meeting was a result of substantial effort by Thayer, who urged Jocelyn to submit another written proposal after the December 8, 1982 bargaining session. That day, Thayer wrote Jocelyn that the Union did not decline to discuss the vacation shutdown, but felt that it must receive a full proposal containing all of Respondent's modifications so

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[34] In one series of letters, Respondent represented that the employee did not want his name divulged to the Union and that he was offered Union representation, which he declined.

that it could fully and intelligently address the outstanding issues. On December 23 Jocelyn replied that he ought not prepare a new proposal, "a rather major undertaking," unless the Union was willing to agree to Respondent's proposals not to replace its replacement employees, to discharge those employees accused of serious misconduct during the strike, and to be reimbursed of property damage incurred during the strike. The exchange of letters continued into January and February, with accusations being made by Jocelyn that Thayer was only trying to set up Respondent for the filing of more unfair labor practice charges. Finally, on February 18, 1983, Jocelyn agreed to prepare a full and comprehensive proposal.[35]

Thayer should have expected what Jocelyn delivered on June 25. Jocelyn had written to him on February 18, 1983:

> . . . We intend . . . to utilize what we perceive to be our present bargaining power, to persuade you to give us an agreement which will undo generations of restrictive language and practices and equip us, in terms of flexibility and discretion, to respond to an eventual upswing in a way which would never have been possible under the expired Agreement or any proposal we have made to date.

Jocelyn's proposal was solely for the production and maintenance unit; the proposal for the office clericals was

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[35] While the parties were exchanging this correspondence, the parties met on January 12 to discuss a new seniority group which Respondent wanted to create in its industrial products division.

to follow shortly. Before explaining the proposal, Jocelyn reviewed the history of the entire dispute, including Respondent's hiring of replacements; its making of the March 9, 1982 proposal with the caveat that he had other proposals that he was not making at that time; the Union's development of new tactics, including its massive demonstrations and its picketing of the places of business of Respondent's directors; the strike's effect on Respondent, with an emphasis on the Union's alleged vandalism and character assassination; the financial loss incurred by Respondent; and the expenses of training new employees, repairing property that had been damaged, and hiring security personnel.

He then reviewed Respondent's proposal, which included the elimination of all past practices and stipulations and the union shop; Respondent could unilaterally establish measurement standards or amend or abolish them, without recourse to arbitration; the elimination of time studies; Respondent would designate the dates of the summer and Christmas shutdowns with ten weeks' notice, and cancel or reschedule the shutdowns, without any notice; vacation pay would be based on a percentage of an employee's straight time earnings during the prior year; elimination of all seniority; revision of wage scales, so that employees would be paid different amounts depending on whether they were inexperienced new hires, experienced new hires or transfers, or promoted employees; a one-time 11 percent wage increase, with no expiration date for the contract;[36] the pension plan would

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[36] This was not a firm proposal for the duration of the contract. Jocelyn stated that he was not proposing a duration at that time.

remain at $9 per month, per year of service; and Respondent would pay a specified amount for health coverage, and the employees, who had never been required to contribute before, would pay the remainder, including any increases during the contract.

Jocelyn summarized that business was "absolutely terrible" and "bombing." Respondent had furloughed 200 management employees. The plant was running at about 64 percent of capacity. He had hopes that business would pick up in the fourth quarter, but in the meantime Respondent reported losses of $12 million, and the strike cost it more than that. Respondent spent $2.6 million on security alone. Some product lines were destroyed, some by Respondent's inability to deliver, some by the strike, and some by the economy. The only good thing to report was that the Japanese were not penetrating the market but were waiting for the recession to end. But they were still present, and still competitive.

On July 15, the Union responded with its counterproposal, which showed no readiness to surrender. Thayer highlighted some of the proposals: a three-year agreement, with yearly wage increases of 11, 10, and 9 percent; one increase in the pension to $10; and one increase in life insurance, from $9,000 to $10,000 coverage. On other matters previously proposed by Jocelyn, Thayer said that he wanted to discuss them. Jocelyn excepted to Thayer's failure to propose specific language on certain provisions, notably seniority. Thayer's proposal regarding that issue of critical importance to Respondent was only: "discuss and negotiate." Jocelyn indicated that he was unsure how he wanted to proceed

with the negotiations, but he agreed to review the Union's proposal.

The parties next met on August 25, and Jocelyn announced that he considered the Union's proposal incomplete and could not understand why Thayer requested that he put together a complete proposal. Thayer answered that Jocelyn had proposed some new concepts which the parties needed to explore. Jocelyn said that the parties were "miles apart" and he did not know how to convince the Union that Respondent was sincere and that it was fighting for its survival. The discussion continued, questions were asked and answered, and the parties resolve nothing. On September 2, the Union offered specific language on some proposals that it had previously submitted as "discuss and negotiate." It finally agreed to Respondent's proposal of mandatory transfers, a move that might have had more significance had the Union agreed to Respondent's current proposal. However, what the Union agreed to was the proposal that Respondent made in March 1982 and that proposal was no longer being offered by Respondent. In addition, the Union reverted to its proposal of occupational classifications, a proposal which had been rejected by Respondent in March of 1982. Jocelyn wanted additional time to consider whether he could integrate certain of the new proposals with Respondent's, but he cautioned that there was "a big gap." Thayer insisted that the best way to close the gap was to start a dialogue about what Respondent wanted to attain; but Jocelyn restated that he would examine the proposals, and the meeting adjourned.

On September 13, the parties met again, and Jocelyn said that the gap that he had perceived was present, that the Union's proposals did not answer his, and that the parties were more "miles apart" than they had been in March. Jocelyn said that Respondent won the strike and there was no reason that it should settle on the Union's terms. Instead, the Union should settle on Respondent's terms. If the Union wanted to do that, it was free to do so; if not, there was no point in further negotiations.

The last negotiations took place on September 30 and October 4, 5, and 18. The parties have not met since then. These meetings involved solely Respondent's intention to implement changes in its health care program so that those employees who took early retirement could no longer opt to be covered under Respondent's Blue Cross – Blue Shield plan by paying the rate paid by Respondent. 106 employees on strike had applied for early retirement, and Jocelyn said that their coverage under Respondent's rate would cost Respondent money. The change took effect in November or December.

At about this time, or shortly after, the parties were advised that General Counsel Lubbers had ordered the issuance of the complaint in this proceeding. On October 24, 1983, Thayer made an unconditional written offer to return to work on behalf of all the striking employees and that day withdrew the Union's picket line. Receiving no reply, Thayer wrote again on October 28, asking Jocelyn to review the earlier letter. On November 1, Jocelyn replied, accepting Thayer's offer. However, he advised that there were "virtually no positions currently available" and advised further that the employees had been placed

on a preferential hiring list. When positions became available, they would be offered to qualified returning strikers.

There followed a series of letters between the parties. The Union insisted that the strikers, as unfair labor practice strikers, should be immediately returned to their former positions. Respondent insisted that the strikers were merely economic strikers, who would be rehired only when vacancies occurred. In addition, Respondent insisted that returning strikers were entitled to reinstatement only upon their passing a physical examination. Finally, on November 1, Jocelyn stated his willingness to resume negotiations; but, with the unfair labor practice complaint soon to issue, Thayer, in this and later exchanges of correspondence, now insisted that the Union would be willing to negotiate only upon the immediate reinstatement of the strikers. He took the same position in answer to Jocelyn's request for discussion of an interim wage increase and the conclusion of discussions on the early retirement conversion option. Furthermore, Thayer agreed to bargain about the implementation of these proposals only if they were part of the total package, but Jocelyn contended that he had a right to discuss the two issues alone. However, if the Union wished to present a total package, it was free to do so. So, the parties remained deadlocked; and the Union, now finding strength in its budding and hopefully successful unfair labor practice proceeding, resumed picketing in late December.

IV. Analysis and Conclusions

A. Surface Bargaining

Section 8(a)(5) of the Act requires that parties to negotiations have a sincere desire to reach an agreement. *NLRB v. Insurance Agents*, 361 U.S. 477, 485, 498 (1960); *General Electric Co.*, 150 NLRB 192, 268 (1964), enfd. 418 F.2d 736 (2d Cir. 1969). A sincere desire to agree, however, does not mean that a party may not engage in hard bargaining or must accede to the desires of the other party. Section 8(d) of the Act provides that the obligation to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession." The Board has said: "A party is entitled to stand firm on a position if he reasonably believes that it is fair and proper or that he has sufficient bargaining strength to force the other party to agree." *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984), citing *NLRB v. Advanced Business Forms Corp.*, 474 F.2d 457, 467 (2d Cir. 1973).

The antithesis of bargaining in good faith is surface bargaining. In that instance, a party simply attempts to make it appear that it is willing to reach an agreement, although it has no intention to do so. The Board has held that, although adamant insistence on a bargaining position is not of itself a refusal to bargain, the following conduct is indicative of bad faith: "delaying tactics, unreasonable bargaining demands, unilateral changes in mandatory subjects of bargaining, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, withdrawal of already-agreed upon provisions, and arbitrary scheduling of meetings." *Atlanta Hilton*, 271 NLRB at 1603 (footnotes omitted).

The original complaint contained a miscellany of this conduct, plus numerous other examples of alleged bad faith. In their totality, they may have presented at least a more involved factual basis to support a finding of surface bargaining. However, all that remains is an emasculated complaint containing two allegations from which I am urged to find a totality of conduct that Respondent did not sincerely desire an agreement with the Union. The first is that Respondent made no counterproposal from March 28, 1982 through May 1983. The second is that, when at last Respondent made a counterproposal in June 1983, it was regressive and predictably unacceptable. The General Counsel's brief does not explain why the first allegation violates the Act. Rather, the brief recites facts and law supporting all the dismissed allegations and concludes that the strike was an unfair labor practice strike from its inception.[37] Then, it contends that Respondent's March 1982 proposal (which is not alleged in the Complaint) was regressive and predictably unacceptable to the Union; that this prolonged the strike, as did Respondent's advice to the Union that it intended to

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[37] The brief states:

> In summary, Respondent, by its overall pattern of bargaining, namely, predetermined set of proposals which were not critical, its disruptive bargaining tactics (declaring an impasse, canceling a meeting, setting deadlines for the completion of negotiations), its failure to present an economic package including a pension plan until the very end of negotiations, its communications with its employee[s], engaged in bargaining with no sincere desire to reach agreement and therefore violated Section 8(a)(5) of the Act. [Footnote omitted.]

implement various changes in terms and conditions of employment; and that – and I quote the argument it its entirety – "the bargaining in the summer of 1982 was a continuation of Respondent's course of conduct bad faith bargaining *especially in light of Respondent's refusal to make a proposal.*" (Emphasis supplied.)

The General Counsel and the Union do not claim that there was no impasse. They contend only that the impasse was caused by Respondent's bad-faith bargaining prior to the strike and the applicable Section 10(b) period. Because of my *Ducane Heating* Order, I cannot treat the impasse as one caused by unfair labor practices. I have previously found that an impasse existed on October 18, 1981, when the strike began, and four months later, in late February 1982. Reviewing the negotiations after February 1982, I find that the parties continued to be utterly stalemated and that negotiations were fruitless. Had it not been for the violence which prompted Respondent to commence an injunction action and the resultant State court order which required the parties to return to negotiations, the parties may well not have met in March 1982, so clear it was to them how deeply divided they were. Later negotiations were sporadic and minimal. Efforts of the FMCS in the summer resulted in nominal new concessions by the Union, but no major accomplishment on the absolutes. Although the Union made a new seniority proposal, that would have so altered the way Respondent could do business that Thayer could not reasonably have expected that Respondent would agree to it. No substantive negotiations were held during the rest of 1982. The only real activity in 1983 occurred when Respondent presented its counterproposal, which now

constitutes part of the complaint. The summer negotiations showed no signs of a real change for success.

In attempting to ascertain whether further negotiations were going to be fruitful, and limiting for the moment my analysis solely to the two absolutes, I find that Jocelyn was never going to withdraw his proposals. He had earlier threatened that they must comprise part of the overall settlement of the negotiations; and, although he was prepared to revise his proposals to meet certain of Thayer's objections and, in fact, did so, he saw no sense in meeting with Thayer until Thayer indicated some assent. Until September 1983 Thayer, however, never withdrew his fervent opposition to the elimination of machine seniority and job preference. Although Jocelyn repeatedly asked Thayer to revise Respondent's proposals to resolve any problems that he though might arise, Thayer did not do so.

I am not blaming Thayer, Thayer expressed in November 1981 that the Union was on strike only because of Respondent's proposals, and not the Union's. He had the right to maintain and continue his opposition. To him, the absolutes constituted Respondent's attack on the little seniority protection that the Union provided to its older members. Thayer was not going to risk that loss. There was nothing in Jocelyn's proposal that Thayer could rewrite to salvage something for his members. Respondent's proposal either was or it was not. Only if it "was not" was it acceptable; if it "was," there was nothing to talk about. So firm was his distaste for the mandatory transfer clause that Thayer rejected Jocelyn's revision to permit the Union the unilateral right to veto any transfer pending review by an arbitrator. Respondent

had no right to transfer any employee against his or her will, and the Union was not going to permit an arbitrator to approve such a transfer. To Thayer, there was no reason, not even a valid, legitimate, and business-justified reason, that should permit Respondent to force an employee to transfer against his will.

At least that was Thayer's position until the summer of 1983, when he finally agreed to Jocelyn's proposal made and withdrawn almost a year and one-half before. By then, of course, Jocelyn was no longer willing to give Thayer some of the protections contained in the prior offer, which Jocelyn had revised to meet certain of Thayer's objections. In that respect, Thayer simply accepted mandatory transfers too late. As to machine seniority and job preference, Thayer never accepted it at all. The dispute involving that proposal continued throughout all negotiations and never showed any sign of resolution.

Admittedly, these were only two issues in the negotiations. Because the parties were never able to resolve them, they were never able to reach a variety of other issues which appeared to be major stumbling blocks. The provisions of a strike settlement agreement, including the thorny issue of the reinstatement of strikers, surely would have created problems. My sampling of Thayer's reactions shows how little he thought of certain of Respondent's proposals and how he projected that the Union's membership would reject those proposals. I find that Thayer thought that bargaining was fruitless and futile.

Respondent's view was the same. In a meeting in October 1982 with a committee of Respondent's representatives, Governor Garrahy said that he had attended an

AFL-CIO meeting where he had been given a hard time about the strike. He hoped to resolve it. Jocelyn told him that prospects for a settlement were "virtually nil." Respondent was suffering business reversals and had begun layoffs. The Union was relying on the Waterman charge for salvation. It had nothing to gain by ending its strike. The strikers would be giving up their weekly strike benefits, and there were no vacancies for strikers to fill. I conclude that the parties correctly understood that they were at an impasse and that additional negotiations would not be fruitful, as in fact they proved not to be.[38]

The first component of Respondent's alleged surface bargaining is that Respondent made no counterproposal after March 17, 1982, while an impasse existed. The General Counsel's brief omits any authority to support her theory that Respondent violated the Act, and there is undoubtedly good reason. The very existence of an impasse means that there is no real hope that, without substantial and meaningful movement, the parties can reach an understanding. What the complaint seeks is a ruling that a party must attempt to break an impasse by making new offers. No one has ever imposed such an obligation upon parties to collective bargaining, because it is a finding that one of the parties has a duty to yield

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[38] The views of the mediators support my conclusion. Calderone was aware that the absolutes could not be resolved unless the Union agreed to them or Respondent withdrew them. He also knew that neither party was prepared to change its position. For example, when it became evident in March 1982 that Respondent would not agree to the Union's new seniority proposal, Calderone told the parties that he saw no point in continuing to talk about any of the other issues.

on its position. However, Section 8(d) states, and it has always been understood to mean what it says, that no one, not Respondent here, and not the Union, either, has to make any concession.

What is remarkable about this alleged component of surface bargaining is that it seeks to invalidate the very concept of an impasse. If approved, the complaint dictates that a party has the duty to do something to prevent an impasse from occurring.[39] However, the Board has instructed that "the parties' duty to bargain during impasse is suspended pending a change in circumstances." *J. Hofert Co.*, 269 NLRB 520, 522 (1984). Once Respondent withdrew its final proposal in March 1982, it "was under no legal obligation to put forth a new proposal . . . regardless of whether the final proposal was explicitly withdrawn." *Id.*[40] The General Counsel's theory directly contradicts this authority, as well as common sense. I find that it lacks merit.

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[39] The theory of the complaint would support a finding that the Union was equally guilty of surface bargaining because it refused to agree to the absolutes.

[40] The General Counsel suggests that it was somehow unfair or even illegal for Respondent to withdraw any of its offers at any time or to set a deadline on them. That suggestion is unsupported and inaccurate. The reason why a party should be permitted to place a deadline on an offer or withdraw it is that the Board's rules of contract law are quite different from the technical rules of common law. A party may accept an offer months after it was made, even when that party earlier responded with counterproposals and rejections and only later accepted the offer. *Curtin Matheson Scientific, Inc.*, 287 NLRB No. 35, slip op. at 11-13 (1987); see, generally, *Pepsi-Cola Bottling Co. v. NLRB*, 659 F.2d 87 (8th Cir. 1981).

The second component of the surface bargaining complaint, the regressive and predictably unacceptable proposal of June 1983, has equally little appeal. Collective bargaining depends on not only reasoned consideration of various arguments but also the parties' needs and desires. A party is free to take any bargaining stance which reflects its perception of its needs and bargaining strength at the time. "An employer is entitled to advance a position sincerely held, notwithstanding the employer's having taken a different position at an earlier time." *Atlas Metal Parts Co. v. NLRB*, 660 F.2d 304, 308 (7th Cir. 1981) (footnote omitted).

The strike was more than 20 months old on June 25, 1983, when Respondent made its allegedly regressive proposal. Because of the impasse over the absolutes, the negotiations since the beginning of the strike were sporadic. There were some discussions immediately after the beginning of the strike and stretching into November 1981. There was some movement towards reconciling the positions of the parties regarding the absolutes, but Jocelyn did not move far enough to placate the Union. The December 1981 efforts of a "think tank" resolved nothing when Thayer changed his position on the effects of job ranking. Thereafter, the principal negotiations took place in March 1982, and those sessions resulted solely because the State court judge who was considering Respondent's injunction application ordered the parties to resume their negotiations.

Those negotiations brought the parties no closer. The absolutes remained a fundamental difference, with no real hope of resolution. A strike settlement agreement became a massive problem. The resolution of the rehiring

of the strikers or the continued employment of the replacements never came close to resolution. Additional problems resulted from Respondent's alleged experiences learned during the strike, such as supervisors working on unit work. Thayer said that he would never agree to them. And the problems grew, and the number and quality of the differences between the parties became greater. Their dispute broadened, rather than lessened.

By November 1982 the parties could not agree upon the scope of what they should be talking about. Jocelyn wanted to discuss the changes that he wanted to implement, while Thayer wanted to discuss the proposed changes in the context of the entire agreement. Thayer urged Jocelyn to make a new proposal. However, Jocelyn did not want to expend that effort unless he could have some assurance that Thayer was willing to settle some of the issues which resulted from the strike. Despite Thayer's refusal to commit himself, Jocelyn finally gave the Union a complete proposal, as Thayer had requested. Respondent had won the strike, but it had lost business and money and had paid for its strike expenses. Under the Act, Respondent was entitled to consider what it had suffered during the strike, take a hard look at its bargaining strength, and change its demands accordingly. *O'Malley Lumber Co.*, 234 NLRB 1171, 1179-1180 (1978); *L.W. Le Fort Co.*, 290 NLRB No. 45 (1988). Once it determined that the Union had lost the strike, Respondent could capitalize on its new-found economic strength to "retrieve some of the economic benefits that it lost in the prior contracts" without violating the Act. *World Publishing Co.*, 220 NLRB 1065, 1071 (1975), enfd. sub nom. *Omaha Typographical Union v. NLRB*, 545 F.2d 1138 (8th Cir. 1976). "A strike is a

two-edged sword. Depending upon how it affects the employer's operations, the strikers may gain concessions or they may lose concessions previously obtained." *Hickinbotham Bros. Ltd.*, 254 NLRB 96, 102 (1981). And Respondent had the right to impose a deadline on the time that the Union had to accept it. *Barry-Wehmiller Co.*, 271 NLRB 471, 472 fn. 7 (1984); *J. Hofert Co.*, supra. See also *Hendrick Mfg. Co.*, 287 NLRB No. 33 (1987).

If Respondent had the right to retrieve what it had lost in prior negotiations and concessions it had earlier given and make changes in accord with what it learned during the strike, then its proposals, even if regressive, do not violate the Act. To prove a violation of the Act, the General Counsel must show that Respondent's June proposals were "of such a nature as to warrant the conclusion that they were intended to frustrate meaningful bargaining." *Pipe Line Development Co.*, 272 NLRB 48, 49 (1984). The ensuing negotiations, however, never focused on Respondent's proposals. Instead, Thayer, perhaps mindlessly or perhaps with much thought, because he had no solution to the problem posed by the absolutes, other than rejection, offered a counterproposal which, on the central issue of the absolutes, stated that the parties should discuss and negotiate them. Jocelyn immediately made an issue out of Thayer's lack of a meaningful proposal after almost two years of negotiations. He properly directed the negotiations to the original core of the parties' disagreement, the absolutes. And there, in the summer of 1983, the negotiations remained. The negotiators never began a full discussion of the new proposals, such as the reduced wage offer, the open shop, and all the other provisions that were arguably regressive.

As a result, I find no evidence that in offering them Respondent was motivated by bad faith or an intent to frustrate agreement. *Cook Brothers Enterprises, Inc.*, 288 NLRB No. 46 (1988). Respondent exercised its right to use its economic muscle in good faith to make up for what he perceived were years of contractual strangulation. Because there were no meaningful negotiations about the new proposals, I find no other evidence which proves that Jocelyn made the proposals vindictively or that Respondent was wedded to its entire offer. *Hickinbotham Bros. Ltd.*, 254 NLRB at 104; *Barry-Wehmiller Co.*, 271 NLRB at 473. Finally, there was no proof that Respondent's proposal, which it never wanted to make because it was convinced that the Union would not agree to the issues that caused the strike, sidetracked the negotiations and caused the negotiations to be unsuccessful. The negotiations had been unsuccessful for almost two years, without the June 1983 proposal. *Reliable Tool Co.*, 268 NLRB 101 (1983).

The General Counsel also alleges a violation by repeating what Thayer often said at the bargaining table, that Respondent's proposal had no chance of being accepted by a self-respecting union, relying upon *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131 (1st Cir. 1953), cert. den. 346 U.S. 887 (1953); *Sweeney & Co.*, 176 NLRB 208, 212 (1969), modified 437 F.2d 1127 (5th Cir. 1971). In *Reichhold Chemicals, Inc.*, 277 NLRB 639, 640 (1985), the Board appeared to abandon any subjective evaluation of bargaining proposals: "The Board will not attempt to evaluate the reasonableness of a party's bargaining proposals, as distinguished from bargaining tactics, in determining whether the party has bargained in good faith."

However, the Board, on "further reflection," concluded that the prior statement was "an imprecise description of the process the Board undertakes in evaluating whether a party has engaged in good-faith bargaining." *Reichhold Chemicals, Inc.*, 288 NLRB No. 8, slip op. page 3 (1988). The Board continued:

> Specifically, the quoted sentence could lead to the misconception that under no circumstances will the Board consider the content of a party's proposal in assessing the totality of its conduct during negotiations. On the contrary, we wish to emphasize that in some cases specific proposals might become relevant in determining whether a party has bargained in bad faith. The Board's earlier decision in this case is not to be construed as suggesting that this Board has precluded itself from reading the language of contract proposals and examining insistence on extreme proposals in certain situations.
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> That we will read proposals does not mean, however, that we will decide that particular proposals are either "acceptable" or "unacceptable" to a party. Instead, relying on the Board's cumulative institutional experience in administering the Act, we shall continue to examine proposals when appropriate and consider whether, on the basis of objective factors, a demand is clearly designed to frustrate agreement on a collective-bargaining contract. The Board's task in cases alleging bad-faith bargaining is the often difficult one of determining a party's intent from the aggregate of its conduct. In performing this task we will strive to avoid making purely subjective judgments concerning the substance of proposals. (Footnote omitted.)

I find, therefore that there is no legal justification for the allegation that Respondent engaged in surface bargaining because the Union, as a "self-respecting" union, could not accept the absolutes. Whether Respondent proposed the absolutes to frustrate agreement would have been a viable argument had it been raised timely, but it is barred by my *Ducane Heating* ruling. Whether the absolutes are "extreme proposals" is also barred by Section 10(b). If that issue were not barred, I would find that the provisions that would permit Respondent to transfer and assign employees are not uncommon in collective-bargaining agreements. Furthermore, although the Union adamantly opposed them, it finally agreed to one of the mandatory transfer provisions proposed by Respondent. The Union was also willing at one time to eliminate seniority if Respondent would agree to the Union's job ranking proposal. Under these circumstances, I find that the proposals are not "extreme" and that Respondent did not violate the Act by proposing them.[41]

The General Counsel makes two other arguments. The first is that Respondent's offer was for a contract

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[41] Jocelyn testified at some length about private conversations he had with some officials of the Union's international organization in September 1983. There was a move, behind Thayer's back, to settle the strike based on Jocelyn's June 25 offer, omitting the open shop proposal. A scheme was adopted to undercut Thayer, but all efforts failed when General Counsel Lubbers announced that he had authorized issuance of a consolidated complaint. This testimony tends to show that Jocelyn made his June 25th proposal not to frustrate agreement, but to obtain an agreement. He was almost successful.

without a term. That is an unfair and unwarranted characterization of what Jocelyn offered in June. The Union's notes show that Jocelyn said that he "was not proposing [a contract duration] at this time." Respondent's notes state that Jocelyn thought that the contract duration "will depend on [the] contract." Jocelyn was obviously saying that, depending on the substantive terms of what the parties agreed to, he would propose a term of the contract. For example, I understood him to mean that, if the parties agreed to one wage increase, a one-year agreement could be negotiated. If they agreed on two increases, a two-year term could be agreed upon. In no sense did I understand that Jocelyn was proposing a single wage increase in a contract with no end.

The second argument of the General Counsel, quoted in its entirety, is that: "[W]hen the Union made a counterproposal it was completely rejected by the Respondent [and Respondent failed] to even consider the Union's proposal." I am not sure what this argument means. The brief says nothing more – no citations of authority, no words of wisdom. I do not even know how this relates to what Respondent is charged with. Finally, I do not know what the General Counsel expected of Respondent. If the expectation was that Respondent should immediately have made concessions, I have already rejected that notion.

The two major issues continued to be the absolutes. Although the Union finally gave in to the idea of mandatory transfers, it never agreed to Respondent's proposal on job preference. Instead, Thayer offered a proposal for a massive revision of seniority principles which Respondent had rejected almost 18 months before. I know of no

reason that Respondent was required to pause before rejecting what appeared to be a badly calculated offer or should not have had the immediate right to reject this proposal. After all, it had analyzed the proposal fully a year and one-half before. Because of the lack of any legal support in the brief, apparently the General Counsel knows of no reason, either. Finally, the exchange of proposals in mid-1983 represented an attempt by the Union to return to offers which had some validity when the Union had greater bargaining strength. Now, the Union was weak and Respondent was capitalizing on that weakness and its strength. The Act permits it to do so. *Rescar, Inc.*, 274 NLRB 1 (1985).

B. The Refusals to Furnish Information

I have previously dismissed one allegation of the complaint alleging that Respondent refused to furnish the Union with certain information. There are other similar violations which remain in the complaint. On September 13, 1982, Thayer requested that Respondent supply him with copies of transfers normally supplied to the Union under the terms of the expired collective-bargaining agreement, copies of upgrading of employees, and copies of any letters of termination of employees in the units represented by the Union. On September 21, 1982, Respondent notified the Union that a returning striker, who requested that Respondent not divulge his name, had been suspended for ten days. On September 24, Thayer demanded, among other things, the employee's name, which Jocelyn refused to give.

Jocelyn's refusal to supply that employee's name was consistent with his refusal to supply the names of any of the employees in the other documents that Thayer had requested. A bit of historical perspective is warranted. By letter dated March 1, 1982, the Union requested the names and addresses of all replacement employees. Respondent, replying on April 6, 1982, declined to do so because it would create a "clear and present danger to the employees." The names and addresses of replacements are presumptively relevant, and the Union does not have to particularize its need for such information. *Trumbull Memorial Hospital*, 288 NLRB No. 153, slip op. at 2 (1988); *Bozzuto's, Inc.*, 275 NLRB 353 (1985); *Georgetown Holiday Inn*, 235 NLRB 485, 486 (1978). However, when the Union filed an unfair labor practice charge based on this refusal, Respondent argued before the Regional Director, and convinced him, that no complaint should issue because the Union's picket line misconduct would lead to violence to and harassment of the strike replacements. The Union's unfair labor practice charge in Case No. 1-CA-19,690 was dismissed, and the Office of Appeals affirmed that decision.

In response to the Union's letters in September 1982, Respondent initially refused to supply any of the information that the Union sought. However, as part of an informal settlement of the Union's unfair labor practice charge, Respondent agreed to provide everything but the names of the employees. The General Counsel now argues that the omissions of the names render the information useless and that, in any event, it is well established that there must be more than a speculative concern on Respondent's part; there must be a clear and present danger, citing *Burkart*

Foam, Inc., 283 NLRB No. 58, ALJD at page 11 (1987), enfd. 848 F.2d 825 (7th Cir. 1988); *Safelite Glass*, 283 NLRB No. 136, ALJD at page 37, fn. 26 (1987).

The General Counsel contends that Respondent provided no evidence that the Union would harass the strike replacements. I disagree. Jocelyn testified to two mass demonstrations in which people were injured and property was damaged. He testified to an explosion of a van. He testified that Respondent twice brought injunction actions against the Union. Respondent filed an unfair labor practice charge complaining of the violence, and the General Counsel issued a complaint alleging 28 separate incidents of Section 8(b)(1) conduct occurring from February 4, 1982 to June 3, 1982. The conduct complained of ranged from threats of bodily harm to throwing rocks and other projectiles to arson and detonating explosive devices and assault.[42] The Union executed an informal

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[42] On March 31, 1982, the State court found similar conduct committed since March 4:

> damage to automobiles, threats, threats of physical violence, broken windows, flying missiles. One incident testified to, a six-inch boulder or stone was thrown through a window in an occupied vehicle. There has been at least one fire, an attempt to block ingress and egress in North Kingstown by throwing debris on the road, pounding on automobiles, nails in the highway, nails in tires. And there is no question in my mind of the extent and the horribly violent nature of these facts, as I have determined them to be. The March 22 incident was chaos, anarchy, danger to life, and a condition that a civilized society ought not to be expected to endure.

settlement agreement of the charge. While the settlement does not constitute a confession of liability, there was nonetheless enough proof to convince the Regional Director to issue a complaint.

This is a sufficient showing of harassment of and violence against the strike replacements. Most of the violence took place at or near Respondent's facilities. Some employees, however, were being harassed at their homes, and some employees were assaulted at places where they met to carpool. The object was to stop current employees from breaking the strike, and it is logical to infer that the Union was responsible. At the hearing, the Union neither denied that the violence occurred nor that it was responsible for the violence. I find that Respondent had a reasonable basis for believing that the Union was fostering this violence. There was, therefore, a clear and present danger that the Union would continue its illegal activities and a substantial reason for Respondent to withhold the names of current employees. I will, therefore, dismiss the complaint as it alleges that Respondent violated Section 8(a)(5) by refusing to reveal the names of current employees.

However, there was no showing that the Union committed violence against employees who had been terminated. There was obviously an attempt to disrupt Respondent's business by preventing Respondent's employees from reporting to work. There would be little

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Nonetheless, the court was unable to find that the Union was responsible for this conduct, despite its finding that Thayer was present at the picket line daily, a fact that may well have convinced the Board of the Union's liability.

purpose for the Union to commit violence against those who were no longer working for Respondent and who were not reporting for work. I, therefore, find no clear and present danger that the Union would take action against them and conclude that Respondent had no justification for withholding their names.[43] I conclude that Respondent has violated the Act in this one respect.

C. The Unilateral Changes

I have recited various unilateral changes which constitute allegations of the complaint. Because there is no evidence to the contrary. I credit Jocelyn's letter that stated that some of those changes had not been implemented. There is still a legitimate claim of impropriety because his letter constituted a threat to violate the Act. In addition, I find that Respondent increased wages and other benefits on or before April 6, 1982 and implemented an interim wage increase on or about December 5, 1983. Finally, on or about November 23, 1983, Respondent announced that it was going to eliminate the early retiree health plan conversion plan effective on November 30, 1983.

I have found above that the parties had reached an impasse long before Respondent implemented these changes. It is well settled that, when there is an impasse, an employer is free to change terms and conditions of

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[43] By November 18, 1982 Respondent had agreed to settle the portion of Case No. 1-CA-19,958 relating to many of the Union's demands for information and had given it the names of the employees who had been suspended or terminated.

employment as long as those changes were reasonably encompassed in its earlier rejected proposals, as they were here. *NLRB v. Katz*, 369 U.S. 736, 745 (1962); *Western Publishing Co.*, 269 NLRB 355 (1984). The rule applies to all the pre-impasse proposals, even if no impasse had occurred as to certain of the proposals which were implemented. *Western Publishing Co.*, supra.

The only facts presented which may distinguish this proceeding from the ordinary one is that certain of the implemented proposals had earlier been withdrawn. I find no cogent reason that Respondent should not be permitted to do exactly what it did. The Union had the opportunity to accept a contract containing all the proposals that Respondent later implemented. The Union had the opportunity to discuss each of these proposals and to persuade Respondent to offer a contract more to the Union's liking. It ultimately decided that Respondent's proposal was insufficient. The impasse continued; and Respondent was entitled to withdraw its offer, was under no duty to propose a different proposal, and could make changes in working conditions so long as they did not exceed what it has previously offered to the Union. *J. Hofert Co.*, 269 NLRB 520, 521-522 (1984); *Taylor-Winfield Corp.*, 225 NLRB 457, 463 (1976). For the same reasons, Respondent did not violate the Act when it granted the interim wage increase in December 1983. The Union had agreed to that wage increase more than a year before, Respondent had made no better offer in the interim, and the amount of a wage increase was never an issue that separated the parties.

The last unilateral change complained of was Respondent's proposal to eliminate the health insurance

for retirees, a proposal which Respondent had discussed with the Union as early as July 12, 1983 and at four later negotiating sessions. The Union consistently refused to assent to this kind of relief unless it was a part of a total settlement of the strike. Because of the Union's position, the parties were once again at an impasse; and Respondent was entitled to do what it did. An even more compelling reason is that Respondent, while agreeing to talk about the issue, relied upon and never waived its rights under *Chemical Workers v. Pittsburgh Glass*, 404 U.S. 157 (1971). That holds that the bargaining obligation does not extend to the benefits of former employees who have retired. Respondent's brief represents that its proposal affected only then retired employees. I am not convinced that this is wholly correct. However, to the extent it is, I conclude that Respondent did not violate the Act by unilaterally changing benefits when it had no obligation to bargain and the persons who were affected by the change were not employees within the meaning of the Act.

Finally, Jocelyn raised both the interim wage increase and the retirees' benefits issues throughout November 1983 and offered to bargain about them before implementing his proposals. It was Thayer who repeatedly refused to negotiate about these changes unless all strikers were first reinstated. Accordingly, I conclude that Respondent never refused to negotiate about the implementation of these proposals, as the complaint alleges.

D. Condition for Reinstatement of Strikers

Commencing in mid-July 1982 Respondent conditioned the reinstatement of strikers upon their taking and passing a physical examination. The complaint alleges that commencing November 1, 1983. Respondent's condition violated the Act. Again, the General Counsel's brief contains no supporting legal argument or citations. I find that under past practice Respondent conducted physical examinations of employees who returned from absences covered by Workmen's Compensation benefits or leaves of absence exceeding two weeks. By November 1983 the strike was more than two years old. Because the requirement for physical examinations applied to all employees after they had been absent from Respondent's employ for two weeks, Respondent's attempt to impose the requirement on returning strikers did not amount to treating them as new employees. Thus, it was not an illegal condition for their reinstatement. I find no violation. *Aztec Bus Lines, Inc.*, 289 NLRB No. 125, slip op. at 12-14 (1988).[44]

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[44] Respondent contends that in March 1982 it proposed to conduct physical examinations of its employees at any time. Because the Union rejected that proposal, Respondent argues that it was entitled to implement it. However, Respondent never gave the Union notice that it intended to implement this proposal; and there is no proof that the proposal was ever implemented. In addition, there was no showing that this provisions was applied to any employees except returning strikers. I reject this defense.

E. The Conversion of the Strike

I have found that Respondent committed a single unfair labor practice of refusing to give to the Union the names of employees who were discharged. The record is barren of any suggestion that this conduct had any relationship to the continuation of the Union's strike. Furthermore, the Union never mentioned Respondent's refusal to its members. I conclude that the strike continued solely because the Union could not reach an agreement with Respondent and was attempting to exert economic pressure to obtain an agreement containing more favorable terms than what Respondent offered it. At no time was the strike converted into an unfair labor practice strike.

V. The Effect of the Unfair Labor Practice Upon Commerce

Respondent's activities set forth in Section III above, occurring in connection with the operations of Respondent described in Section II above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

The Remedy

Having found that Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) and (5) of the Act. I shall recommend that it cease and desist therefrom and post an appropriate notice. Because

Respondent gave the Union the names of the discharged employees in 1982, no affirmative remedy is warranted.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record in this proceeding, including my observation of the witnesses as they testified and my consideration of the briefs and reply briefs filed by the General Counsel, Respondent, and the Union, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[45]

ORDER

Respondent Brown & Sharpe Manufacturing Company, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to supply District Lodge 64, International Association of Machinists & Aerospace Workers, AFL-CIO, with information needed by it to carry out its duties as collective-bargaining representative of Respondent's employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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[45] In the event no exceptions are filed as provided in Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its place of business in North Kingstown, Rhode Island, copies of the attached notice marked "Appendix."[46] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by Respondent's representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. April 5, 1989

/s/ Benjamin Schlesinger
Benjamin Schlesinger
Administrative Law Judge

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[46] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the Notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT fail and refuse to supply District Lodge 64, International Association of Machinists & Aerospace Workers, AFL-CIO, with information needed by it to carry out its duties as collective-bargaining representative of our employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

BROWN & SHARPE
MANUFACTURING COMPANY

_____
(Employer)

Dated _____ By _____
(Representative) - (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 10 Causeway Street, 6th Floor, Boston, Massachusetts 02222-1072.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

BROWN & SHARPE
MANUFACTURING COMPANY

and

DISTRICT LODGE 64,
INTERNATIONAL ASSOCIATION
OF MACHINISTS & AEROSPACE
WORKERS, AFL-CIO, and its
LOCAL LODGES 883, 1088 and 1142

and

BROWN & SHARPE
MANUFACTURING COMPANY

and

LOCAL NO. 119, INTERNATIONAL
FEDERATION OF PROFESSIONAL
& TECHNICAL ENGINEERS,
AFL-CIO

Case Nos.
1-CA-19,224
1-CA-19,690
1-CA-19,958
1-CA-20,283
1-CA-20,291
1-CA-20,304
1-CA-20,508
1-CA-21,560

Case No.
1-CA-19,567

ORDER

Respondent Brown & Sharpe Manufacturing Company moves to dismiss numerous paragraphs of the consolidated complaint in this proceeding, dated 7 December 1983, as amended on 29 December 1983 and at the hearing, based on Section 10(b) of the National Labor Relations Act, as amended, 29 U.S.C. 151 et seq., which provides in part:

> [N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the

> Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge.

On 5 November 1981 Charging Party District Lodge 64, International Association of Machinists & Aerospace Workers, AFL-CIO ("Machinists") filed an unfair labor practice charge in Case No. 1-CA-19,224 alleging that Respondent violated Section 8(a)(5) of the Act by refusing to bargain in good faith with the Machinists in that it: "on or about September 4, 1981 and continuing since, engaged in an anti-union animus campaign by regressive bargaining, by refusing to discuss wages and major economic benefits unless and until other proposals calling for reductions in previously enjoyed seniority benefits, and union representation rights have been resolved . . . [and] bargained in bad faith designed to preclude acceptance of a collective bargaining agreement between the parties, refused to negotiate on employer's 'absolutes,' circumvented the [Machinists'] elected bargaining agents, dealt directly with the employees, for the purposes of undermining the [Machinists'] majority status with its membership."

On 28 December 1981 the Acting Regional Director of Region 1 refused to issue a complaint on the charge, finding that the investigation did not reveal evidence sufficient to establish that Respondent through its conduct either at or away from the bargaining table violated

Section 8(a)(1) or (5) of the Act. The letter stated in part as follow:

> Thus, with the respect to the allegation that [Respondent] engaged in regressive bargaining, I conclude from the investigation that there is no evidence that [Respondent] made proposals for revisions in the contractual provisions regarding job and departmental seniority and job transfers and reassignments for the purpose of frustrating or impeding the collective bargaining process. Rather, it appears from the investigation that although these proposals may have been unpalatable to the [Machinists], they were nevertheless advanced by [Respondent] only because of the lawful business consideration of attempting to increase production and achieve other lawful ends.
>
> With the respect to the allegation that [Respondent] refused to discuss its own proposals, or "absolutes," the evidence revealed in the course of the investigation does not support the allegation. Rather, it appears from the investigation that those items were freely and frequently discussed by the [Machinists] and [Respondent] at various times in the negotiations.

Machinists appealed the action of the Acting Regional Director to the Office of Appeals, which on 29 January 1982 denied the appeal for the reasons set forth by the Acting Regional Director.

On 18 October 1981, the Machinists commenced a strike against Respondent. On 17 February 1982 Charging Party Local 119, International Federation of Professional & Technical Engineers, AFL-CIO ("Engineers") filed an unfair labor practice in Case No. 1-CA-19,567 charge

against Respondent alleging that on or about 15 February 1982, Respondent locked out its members who reported to work, sought to require such members to unconditionally apply for reinstatement to employment on an individual basis in violation of the parties' collective rights and collective-bargaining agreement, and failed to negotiate in good faith with respect to the same. On 8 April 1982 the Regional Director for Region 1 refused to issue a complaint on this charge, finding that Respondent acted lawfully when it required Engineers' members who honored the picket line to execute written statements of application for reinstatement when they applied for reinstatement. He found that those employees were obligated to make an unconditional offer to return to work before Respondent was obligated to reinstate them and that they were subject to being permanently replaced. Implicit in that conclusion was a finding that the Machinists' strike was an economic strike and that Engineers' members were not unfair labor practice strikers. Thus, they were not locked out or unlawfully denied reinstatement because many of them had been replaced and there was no work available for the remainder of them as of 15 February 1982, assuming they had made an unconditional offer to return at that time. The Engineers filed no appeal from this refusal.

The Machinists filed a new unfair labor practice charge on 14 June 1982 in Case No. 1-CA-19,958. On 29 July 1982, the Regional Director refused to issue a complaint regarding the allegation that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally implementing in April and May 1982 various changes in working conditions contained in contract proposals that

Respondent had previously offered. He found that negotiations for a renewal contract were at impasse when Respondent announced and implemented these changes and concluded that Respondent was free to unilaterally implement provisions that were reasonably encompassed within its pre-impasse proposals.

That was based in part upon the Regional Director's findings in Case No. 1-CA-19,224 and Case No. 1-CA-19,690 that Respondent was not engaged in bad-faith bargaining. The latter case was an unfair labor practice charge filed by the Machinists on 18 March 1982, again alleging a violation of Section 8(a)(5) and (1) of the Act by Respondent's engaging in dilatory tactics by refusing and postponing meetings, and engaging in regressive bargaining by escalating its contractual demands repetitively, withdrawing and then resubmitting proposals, advising the Machinists after it had signified agreement to specific proposals that Respondent was reconsidering its demands, proposing that employees hired since the strike be given a different seniority listing than its regular employees, placing a deadline on its latest offer, and threatening to refuse to meet with the Machinists. The Acting Regional Director refused on 28 April to issue a complaint on this charge, the Machinists appealed, and the Office of Appeals denied the appeal on 16 June 1982.

The Regional Director in Case No. 1-CA-19,958 also refused to issue a complaint regarding the allegation that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to incorporate negotiations on the proposed subcontracting of work by Respondent into the negotiations for a new agreement. The remaining allegations were resolved by an informal settlement agreement in which

Respondent agreed that, in the absence of a bona fide impasse, it would not make unilateral changes concerning wages, hours, or working conditions provided for in its expired collective-bargaining agreements with Machinists and agreed to rescind and give no further effect to certain changes it made in May 1982 and thereafter. The Machinists appealed from that settlement and the Regional Director's refusal to issue a complaint on the remainder of the allegations of the charge.

All of these matters came to a head when the Machinists filed a new unfair labor practice charge on 29 September 1982 in Case No. 1-CA-20,283. There, the Machinists charged that Respondent had continued to refuse to bargain in good faith, as follows:

> Since on or about July 30, 1982 the [Machinists] became aware that prior to the commencement of negotiations Mr. David Waterman, former Industrial Relations Director for [Respondent], was terminated by the employer for refusing to carry out a bargaining position designed to preclude reaching agreement with the [Machinists] in collective bargaining, by means inconsistent with and in violation of the National labor Relations Act.

On 27 September 1983, the Office of Appeals wrote to the Machinists that its appeals from the Regional Director's refusals to issue complaints in Case Nos. 1-CA-19,958 et al. had been carefully considered and that:

> The appeals are sustained in part and denied in part. Based on newly-discovered evidence produced during the supplemental investigation ordered in Case No. 1-CA-20283 on February 8, 1983, it was concluded that the dismissals of

> Cases Nos. 1-CA-19224 and 1-CA-19690 should be reconsidered, *sua sponte*. *Winer Motors, Inc.*, 265 NLRB No. 185, *California Pacific Signs, Inc.*, 233 NLRB 450. After a full consideration of all of the evidence presented in Cases Nos. 1-CA-19224, 19690, 19958, 20283, and 20508, it was concluded that [Respondent's] conduct during the collective bargaining negotiations commencing in September 1981 raised Section 8(a)(1) and (5) issues warranting Board consideration based on record testimony developed at a hearing before an Administrative Law Judge. Inasmuch as there is reasonable cause to believe that the strike which commenced on October 18, 1981 was an unfair labor practice strike, *ab initio*, it was deemed unnecessary to determine whether the unfair labor practices alleged in Case No. 1-CA-19958 converted the strike at that time. In view of our determination that the strike was an unfair labor practice strike, the settlement in Case No. 1-CA-19958 was deemed inadequate and the Union's appeal thereof sustained.

The General Counsel's authority for reinstating the charges was, at the time of his action, clear. *California Pacific Signs* rejected respondent's contention that the reinstatement of a dismissed charge based on newly discovered evidence was barred by Section 10(b) of the Act, the Board stating, at page 451:

> Section 10(b) of the Act provides that no complaint shall issue based on any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board. This Section, however, relates only to the actual filing of a charge and, once a charge has been timely filed, the control over, and disposition of, that

> charge is vested exclusively with the General Counsel pursuant to Section 3(d) of the Act. The General Counsel thus has virtually unlimited discretion to proceed on such timely filed charges as he deems fit[4] and, in the absence of a showing of abuse of the discretion, the Board will not interfere with General Counsel's exercise thereof.

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[4] See *Silver Bakery Inc. of Newton*, 150 NLRB 421 (1964).

Winer Motors expressly overruled the Board's rule in *Silver Bakery*. There, the Regional Director revoked her earlier approval of the withdrawal of a timely filed charge after the Section 10(b) 6-month period had expired. The Board held that could not be done.

> . . . [W]e are guided by the Board's longstanding recognition of the proviso in Section 10(b) as being a 6-month statute of limitations. Where such a clear limitations period has been created by Congress, we find that the Board exceeds its authority to allow the General Counsel to ignore such a limitations period on equitable grounds. In reaching this conclusion, we agree with the First Circuit's assessment when it denied enforcement of our Order in *Silver Bakery* [351 F.2d 37 (1965)] that reinstatement of charges beyond the 10(b) period based on equitable considerations was created out of whole cloth and that:
>
> > From the standpoint of respondents, for whom Section 10(b) was enacted, we can think of no good reason why the mere filing of a charge which is withdrawn with the

consent of the Board, so that no proceedings are pending, should leave in the Board a roving discretion to determine that so-called equities warrant the reinstitution of the proceedings without limit of time. The fact that the Board may feel that its discretion is benignly exercised cannot answer the clear purpose of a statute of limitations. [351 F.2d at 39.]

* * *

. . . [W]here a respondent fraudulently conceals from a charging party the operative facts underlying a violation of the Act, the limitations period does not begin to run until the charging party knows or should have known such operative facts.[12] Such a rule, however, clearly has no application to the case before us where the alleged discriminatees were not ignorant of the alleged violation within the limitations period. Further, we take issue with our dissenting colleagues' position that our decision here unduly rewards respondents for deceiving the General Counsel concerning the motive for or nature of its misconduct. It is a rare case where a respondent agreed with a charging party's assessment that respondent engaged in conduct violative of the Act. Rather, in most cases, respondent denies the misconduct alleged or proffers an explanation, and the General Counsel must decide if the evidence is sufficient to sustain the charging party's position. If so, the General Counsel issues a complaint; if not, he dismisses the charge. In other words, the denial of the misconduct by.the respondent should not and is not dispositive of the charge . . . [footnotes 7 and 13 omitted.]

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[12] *Local 825, International Union of Operating Engineers, AFL-CIO (Building Contractors Association of New Jersey)*, 228 NLRB 276 (1977), cited in the dissent, is a case which turned on the Board's interpretation of the facts, the majority finding that the charging party withdrew his charge in reliance on respondent's false statements concerning its hiring hall rules, and the dissent finding that there was no fraud involved and thus no reason to toll the limitations period. This case clearly has no application or relevance to the situation here. In *Local 825*, respondent allegedly gave a false explanation to the charging party as to the reason for his nonreferral which *induced him* to withdraw his charge. Here, the Board investigated the charge, determined that it was lacking in merit, and solicited a withdrawal. That the Respondent did not confess to unfair labor practices during the original investigation but, rather, denied the allegations or proffered an economic defense, does not constitute the type of "fraud" warranting reinstitution of a charge in spite of the 6-month limitation of Sec. 10(b). *N.L.R.B. v. Don Burgess Construction Corporation, d/b/a Burgess Construction, Builders, and Donald Burgess and Verlon Hendrix, d/b/a V & B*, 596 F.2d 378 (9th Cir. 1979), enfg. 227 NLRB 765 (1977); *Pullman Building Company*, 251 NLRB 1048 (1980); and *Plumbers and Steamfitters Local No. 40, United Association of Journeymen and Apprentices of Plumbers and Pipefitting Industry of the United States and Canada, AFL-CIO (Mechanical Contractors Association of Washington)*, 242 NLRB 1157 (1979), cited by our colleagues, are similarly distinguishable. In *Don Burgess*, the charging party union was not aware that Respondent was even employing carpenters, let alone nonunion ones. In *Pullman*, the Charging Party union was unaware that respondent was operating a nonunion jobsite. In *Plumbers and Steamfitters Local No. 40*, the charging party was unaware that his name had been removed from a hiring hall list and

> the Administrative Law Judge noted that, in such cases, "the six month limitation period *does not begin to run* until the . . . unlawful activity . . . has become known to the charging party [Citations omitted.] *NLRB v. Allied Products Corporation. Richard Brothers Division,* 548 F.2d 644, 650 (6th Cir. 1977)." 242 NLRB at 1161. (Emphasis supplied.) Thus, in all these cases, the 10(b) period was tolled because the charging party did not have reason to believe that an unfair labor practice had been committed and, therefore, had not filed a charge. Our colleagues appear to mistakenly equate these situations with those in which, as here, the General Counsel has belatedly determined that a complaint should issue on an already-withdrawn charge.
>
> Nor does a denial of allegations previously made constitute fraudulent concealment. See *Dayco Corporation v. Firestone Tire & Rubber Co.*, 386 F. Supp. 546, 549 (D.C. Ohio 1974), affd. *sub nom. Dayco Corporation v. Goodyear Tire & Rubber Company,* 523 F.2d 389 (6th Cir. 1975). Yet as pointed out by the First Circuit in *NLRB v. Silver Bakery of Newton,* 351 F.2d at 39, our colleagues have "created out of whole cloth" an ill-defined standard that would permit the revival of long-deceased charges whenever allegations of equitable considerations are raised.

Earlier in this proceeding, when Respondent first moved to dismiss various allegations of the complaint, I relied upon *Winer Motors* as authority for the denial of Respondent's Section 10(b) motion. I also reserved decision on Respondent's motion to dismiss those allegations on equitable grounds, to wit, that based on General Counsel's earlier dismissals, Respondent had hired permanent replacements for those whom it had assumed were economic strikers. With the change of General Counsel's position two years later, Respondent might be

liable for a most substantial liability to both the permanent replacements and the unfair labor practice strikers if the strike were found to be an unfair labor practice strike. However, the parties submitted briefs in support of their respective positions and I withdrew my prior partial decision, reserving decision until I had heard the entire case. Respondent filed a special appeal from my ruling. The board, under the mistaken impression that I had denied Respondent's motion, reversed that decision and remanded the same to me with instructions to reconsider it in light of its recent decision in *Ducane Heating Corp.*, 273 NLRB No. 175 (1985), which severely limited *California Pacific Signs* and much of the rationale of *Winer Motors.*

Ducane involved the revocation of a prior dismissal of a charge based on evidence newly discovered after the Section 10(b) period had expired. The Board found no substantial distinction between a withdrawn and a dismissed charge and refused to permit reinstatement of any charge "outside the 6-month limitations period of Section 10(b) absent special circumstances in which a respondent fraudulently conceals the operative facts underlying the alleged violation. Where there is a fraudulent concealment, the limitations period begins to run when the charging party knows or should have known of the concealed facts." Slip op. page 6.

The central issue in this proceeding involves the allegation that Respondent engaged in surface bargaining. The contention of General Counsel is that Respondent did so by holding out for certain "absolutes," that is, proposals which dealt with the issues of job preference, machine seniority, and mandatory transfers of employees,

which Respondent deemed had to be addressed in the agreement as a condition for settlement. These proposals, it was ultimately revealed, had been examined by Respondent's agents in preparation for collective bargaining and were initially deemed to be insignificant to Respondent's operation of its business and so touchy to the Union that if Respondent maintained its position to impasse, its insistence would surely prompt the Union to strike, a result which, the later investigation also revealed, Respondent desired. So, the argument goes, Respondent literally forced the Union to strike over contractual provisions which were not meaningful to Respondent but were of greatest importance to the Union; and Respondent could not have bargained in good faith, in order to reach an agreement, but bargained in bad faith in order to reach an impasse and cause a strike.[1]

Respondent's preparation for collective bargaining consisted of the formation of a steering committee, which authorized the assessment of the various provisions of the provisions of the then subsisting agreement and their importance to the respective parties, whether changes should be sought, and what the reaction of the Union would be to any changes. Position papers were prepared and minutes of the steering committee were kept. However, it was only the charge which mentioned Waterman, and his subsequent compliance with an investigatory

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[1] Although not determinative of this motion, it is fair to note that Respondent counters this argument by contending that its initial position was rejected after further study and review and that it truly and in good faith believed that the "absolutes" were of utmost importance to its continued, successful operations.

subpoena, that the existence of the steering committee's minutes and position papers became known. These were, in the words of the General Counsel's letter, the "newly discovered evidence."

If that is all it was, newly discovered evidence, then Respondent's motion must be granted, under the authority of *Ducane*. But the contention is that the existence of the documents was fraudulently concealed. The initial question president is from whom must the evidence be concealed. Here, Machinists and Engineers filed timely unfair labor practice charges.[2] It is not, however, their actions that are at issue, but the actions of General Counsel in dismissing the charges and reinstating them only after the Section 10(b) period expired. That is contrary to the teaching of *Ducane*, which states that where there is fraudulent concealment, "the limitations period begins to run when the *charging party* knows or should have known of the concealed facts." (Emphasis supplied.) Clearly, the Engineers knew that their members were not reinstated to their jobs. The Machinists knew what was happening at the bargaining table, although it did not know about the steering committee minutes or position papers. The point is that both filed charges, and there is no cogent reason for tolling the limitations period because there is nothing to toll with respect to those timely filed charges.

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[2] See *Mourning v. NLRB*, 505 F.2d 421, 424 (D.C. Cir. 421, 424) (the six-month limitations period runs against a charging party, not the General Counsel); and *NLRB v. Complas Industries, Inc.*, 714 F.2d 729, 734 (7th Cir. 1983) ("The six month limitation period applies only to the filing and service of a charge and not to the issuance or amending of a complaint.")

On the other hand, if Respondent fraudulently concealed operative facts from the General Counsel, then the General Counsel's dismissal might have been based on that fraudulent concealment sufficient to waive the interim two years between the dismissals and the revocation of the dismissals and, in a sense, to toll the limitations period. But that causes severe problems under *Mourning v. NLRB*, for if there is no fraudulent concealment, then there was merely an improper and perhaps negligent investigation of the underlying charge. As the District of Columbia Circuit stated, 505 F.2d, at page 424 fn. 10:

> . . . To permit the General Counsel to negligently cause the elimination of the charging party's rights would raise very fundamental questions about the nature of the charging party's "rights" upon suffering the effects of an unfair labor practice and the nature of the General Counsel's prosecutorial responsibilities. We certainly will not wade into that deep water without a clearer statement that the Board has fully considered these difficult issues and has given us the benefit of its expertise.

Unfortunately, this order must raise those "very fundamental questions" because my reading of *Ducane* requires it. I will leave to the Board the explication of its rationale. I start with the basic premise that a respondent, including Respondent herein, has no obligation to cooperate with the General Counsel in the investigation of an unfair labor practice charge. It may give no information whatsoever, if it so desires. It may merely state its position, without providing sworn statements or witnesses who will be interrogated under oath; or, it may choose to

cooperate and provide requested witnesses to answer whatever questions may be posed. But, as the Board has noted, above, invariably a respondent will deny the commission of any unfair labor practice; and that alone, according to *Winer Motors*, does not constitute "fraudulent concealment.".

Respondent took the latter course. It produced witnesses who sought to convince and persuade the Board's field attorney that it did nothing wrong and, more specifically, that it bargained in good faith. It provided, as requested, bargaining notes, correspondence, and the proposals and counterproposals. It described what transpired at the negotiations and its reasons for taking the positions it did. When the term "absolutes" was raised, Respondent answered what it meant, what it applied to, and why it has applied. Although I find, contrary to Respondent's testimony, that there was no mention of any position papers, because I am convinced that, had they been mentioned, the field attorney would have requested them, I also note the field attorney had been made aware of the existence of the steering committee by the Union. Because the "absolutes" constituted a core of the dispute, I cannot excuse the failure to ask Respondent for any and all documents which related the "absolutes" or which related to the steering committee, a demand which, if answered by Respondent that there were none, may well have constituted a fraudulent concealment. But there was no demand, and there was no duty for Respondent to produce position papers on steering committee minutes or anything else, unless a demand were made.

Fraudulent concealment involves a duty to reveal an operative fact. Counsel for the General Counsel cites

Black's Law Dictionary, 5th ed. West Publishing Co., to define the term as "The hiding or suppression of a material fact or circumstance which the party is legally or morally bound to disclose . . . The test of whether failure to disclose material facts constitutes fraud is the existence of a duty, legal or equitable, arising from the relation of the parties, failure to disclose a material fact with intent to mislead or defraud under such circumstances being equivalent to actual 'fraudulent concealment.' " Counsel for the General Counsel and Machinists cite numerous decisions supporting their view that somehow there was a duty to reveal the existence of the minutes and position papers. I find none of them helpful. Rather, there has been no showing whatsoever that Respondent had a duty to reveal anything.

A concealment, if any, must be fraudulent. There is nothing to demonstrate that any fraud was involved. Clearly, there was no misstatement, because the important questions were never asked and the pertinent information was never demanded. All that is here is that Respondent did not tell the field attorney about minutes and papers which might have contradicted the bona fides of its position that the "absolutes" were truly desired, rather than proposed solely as a means to create an impasse and a strike. But, as the Board said in *Winer Motors*, it is a rare case where a respondent agrees that it violated the Act and it is typical that a respondent denies a violation and proffers an explanation for its conduct. If this were a Section 8(a)(3) discharge case, counsel for the General Counsel would have the Board authorize reinstatement of a charge anytime it is later ascertained that there is some evidence that an employer was motivated

by the employee's union activities. There is no doubt that such evidence is newly discovered, but *Ducane* appears not to permit that as justification for the reinstatement of the charge.[3] There must be a fraudulent concealment, and that is lacking in this proceeding.

Accordingly, the allegations of the complaint which are based upon the unfair labor practices which are alleged in Case Nos. 1-CA-19,224, 1-CA-19,567, and 1-CA-19,690 must be dismissed. The identification of the paragraphs of the complaint which must be dismissed is not immediately apparent, due to the generality of the unfair labor practice charges[4] and the General Counsel's 27 September 1983 conclusion that the Machinists' strike was an unfair labor practice strike *ab initio*. By this Order, it must be found that relief may not be granted on the three charges which are time-barred based on the theory that the strike was an unfair labor practice strike *ab initio*. Because the Engineers' filed only one charge which was not appealed from, the complaint on behalf of the Engineers is extinguished. However, the Machinists' claim in Case No. 1-CA-19,958 that the strike was converted to an

---

[3] *Duff Norton Co.*, 275 NLRB No. 93 (1985), may be read to the contrary. There, a former supervisor revealed that he had set up an alleged Section 8(a)(3) discriminatee for discharge by tampering with certain machines at the workplace. The Board did not hold that such evidence did not constitute "fraudulent concealment." Rather, it held only that there was an insufficient nexus between the tampering and the employee's performance of his inspection duties.

[4] For example, it appears that the amendments at the hearing to the dates in Paragraphs 17(b) and 19(b) may be barred by Section 10(b). I will not grant relief for unfair labor practices which occurred outside of the limitations period.

unfair labor practice strike was not considered. Furthermore, there is nothing that prohibits the newly discovered evidence from being utilized as background to the numerous charges which were timely filed and were not finally dismissed by the General Counsel or not appealed from. *Rikal, Inc. v. NLRB*, 721 F. 2d 402, 405 (1st Cir. 1983).

My Order, therefore, is conditioned upon the parties' right to move to reconsider its scope and the General Counsel's right to move to amend the complaint to encompass allegations arising out of the charges which are not subject to Section 10(b) of the Act, all within 21 days of the date hereof. The parties shall submit memoranda of law in support of their respective positions. If none of the parties shall exercise the right to move pursuant hereto, this Order shall become final on 16 May 1986 for the purpose of Section 102.26 of the Board's Rules and Regulations. Accordingly, it is hereby

ORDERED, that that portion of the consolidated complaint in Case Nos. 1-CA-19,924, 1-CA-19,567, and 1-CA-19,690 [paragraphs 16(a-q), 17(b)v, 19 (only that portion which refers to paragraph 17(b)v), 25(b), 26 (only that portion that alleges "caused by unfair labor practices of Respondent described in paragraph 16 and"), 27(a), and 28(a)] is hereby dismissed.

/s/ Benjamin Schlesinger
Benjamin Schlesinger
Administrative Law Judge

Dated: Washington, D.C., 16 April 1986

Supreme Court, U.S.
FILED
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No. 97-1515

In The

Supreme Court of the United States

October Term, 1997

DISTRICT LODGE 64, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO AND ITS LOCAL LODGES 883, 1088, AND 1142,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

BROWN & SHARPE MANUFACTURING COMPANY,

Intervenor.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF IN OPPOSITION OF BROWN & SHARPE MANUFACTURING COMPANY

THOMAS C. KEENEY
Counsel of Record
WILLIAM R. POWERS, III
Attorneys for the Intervenor
POWERS, KINDER & KEENEY, INC.
1400 Turks Head Building
Providence, RI 02903
(401) 454-2000

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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RULE 29.6 LISTING

Pursuant to Rule 29.6 of the Court's rules, counsel for Intervenor certify the following:

Inervenor Brown & Sharpe Manufacturing Company is a publicly-owned corporation organized under the laws of the State of Delaware for all lawful purposes, and is affiliated with the following entities:

Joint Venture Companies Affiliated

1. Automation Software Incorporated, a Delaware corporation (50% owned by Brown & Sharpe; 50% owned by Analysis & Technology, Inc.); 9/16/85

2. Brown & Sharpe – Precizika, a joint venture company formed under the laws of the Republic of Lithuania; 6/13/91 (52.8% owned by BSP, Inc.; 43.2% owned by the ENIMS Institute, Vilnius Branch; and 4% owned by Euromedika, Inc., a Massachusetts corporation.)

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COUNTER STATEMENT OF THE CASE

Intervenor concurs with the recitation of the Statement of the Facts and Procedural History set forth in Petitioners' Petition For A Writ Of Certiorari (hereinafter, "Petition"), except as follows.

In its second supplemental decision, the National Labor Relations Board (hereinafter "Board") expressly rejected Petitioners' assertion that a charged party who cooperates with an investigation by the General Counsel has an obligation to produce, on its own initiative, an item that was not requested by the General Counsel. *Brown & Sharpe Mfg. Co.*, 321 NLRB 924, 925 (1996) (hereinafter *"Brown & Sharpe III"*).

Further, both the Board and the court of appeals rejected Petitioners' assertion that by providing all information and documents requested, Brown & Sharpe deliberately misled the Board investigator into believing that the company had provided all information and documents arguably relevant to the investigation. There is no evidence that Brown & Sharpe either lied or misled the investigator, deliberately or otherwise. As observed by the court of appeals, "[m]ost telling is the fact that if Brown & Sharpe had intended its participation as a ruse to distract the investigator from the steering committee documents, it seems doubtful that it would have acknowledged the existence of the steering committee at all." *District Local 64 v. NLRB*, 130 F.3d 1083, 1088 (D.C. Cir. 1997). Further, there is substantial evidence in the record to support the Board's finding that Brown & Sharpe in no way masked the contents of the Steering Committee notes. In this regard, the court of appeals

highlighted the record evidence that the General Counsel's investigator testified that it was not his usual practice to ask companies for documents showing how they arrived at their bargaining positions. *Id.*

REASONS FOR DENYING THE WRIT

I. Two Of The Questions Presented In The Petition For Certiorari Were Neither Raised Below Nor Addressed By The Court Of Appeals.

This Court has often stated that certiorari should not be granted where "the question presented was not pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992); *see also Yee v. Escondido*, 503 U.S. 519, 533 (1992). In this case, two of the questions presented in the Petition were neither raised by Petitioners below nor addressed by the court of appeals and, accordingly, have been waived. The two questions are: Question A: "Does the National Labor Relations Board have *authority* to interpret and apply equitable tolling provisions of borrowed federal statute of limitation in a way that conflicts with relevant decisions of federal courts?" and Question D: "Where reasonably possible, must the National Labor Relations Board take affirmative steps to avoid the extinction of rights granted under the National Labor Relations Act which may be caused by the board's own acts of negligence?" Petition at i (emphasis added).

As to the first question presented, Petitioners argue that the Board lacks the authority to fashion its own version of the equitable tolling doctrine as applied to the untimely reinstatement of previously dismissed unfair

labor charges, citing this Court's decision in *DelCostello v. Teamsters*, 462 U.S. 151 (1983).[1] Specifically, Petitioners argue that the Board was without authority to reject "the glosses on the fraudulent concealment doctrine set forth by various Federal courts." Petition at 14.

This case commenced approximately seventeen years ago and has involved two decisions by an administrative law judge, three decisions of the National Labor Relations Board and three decisions of the court of appeals. While the Union clearly had ample opportunity to raise the issue of the Board's authority to fashion its own standard for fraudulent concealment, at no time did it do so.

Petitioners' "Summary of Argument" in its final brief in support of its Petition for Review from the Board's second supplemental decision includes:

> Brown & Sharpe should be tried for bad faith bargaining because its fraudulent concealment of operative facts tolled the applicable period of limitations. The NLRB misconstrued and misapplied Circuit case law when it condoned Brown & Sharpe's knowing attempt to mislead the Board Investigator about the existence and significance of secret company documents. The Complaint should be reinstated and the cause remanded for trial.

In that petition for review, Petitioners argued to the appeals court that while the Board purported to adopt

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[1] As fully set forth below, the *DelCostello* decision does not support Petitioners' argument. That case is wholly inapposite to the instant matter.

that court's standard for defining fraudulent concealment, it was unfaithful to that standard. At no time did Petitioners argue that the Board lacked the authority to fashion its own standard. This is a significant difference. At no point, when before the appeals court, did Petitioners challenge the Board's *authority* to fashion an appropriate standard for determining when or if fraudulent concealment would toll the six-month limitation period on the reinstatement of variously dismissed unfair labor practice charges. Nor did Petitioners ever argue below that the court of appeals should decline to defer to the standard adopted by the Board on the grounds that it was unreasonable. Rather, Petitioners have consistently argued that the Board made erroneous findings of fact and misconstrued its own adopted standard.

Moreover, the court of appeals did not, on its own initiative, address the issue of the Board's authority to devise its own fraudulent concealment standard. The court summarized Petitioners' argument and its holding as follows:

> While not contending that the Board adopted an erroneous legal standard for fraudulent concealment, [Petitioner] maintains that the Board misconstrued and misapplied this court's precedent when it found that Brown & Sharpe had not fraudulently concealed the steering committee documents. We find no basis to overturn the Board's legal decision that an affirmative act of concealment was necessary to trigger the exception in the *Ducane* rule. Nor do we find any basis on which to overturn the Board's factual determination in applying this rule that there was no such act.

District Local 64, 130 F.3d at 1087. Thus, it is clear that Petitioners waived the argument that the Board lacked the authority to fashion an appropriate standard for fraudulent concealment.

Similarly, Petitioners failed to raise in the proceedings below, and the court of appeals did not address the fourth question presented, "[w]here reasonably possible, must the National Labor Relations Board take affirmative steps to avoid the extinction of rights granted under the National Labor Relations Act which may be caused by the board's own acts of negligence?" Petition at i. As set forth above, Petitioners' arguments in support of their petition for review below were limited to attacking the Board's application and construction of its standard for fraudulent concealment. Question D. raises an issue notably absent from both the final brief and reply brief filed by Petitioners in support of their petition for review of the second supplemental decision and order of the Board.

Simply put, because the Administrative Law Judge, the Board and the court of appeals have all rejected such arguments as Petitioners saw fit to make below, Petitioners now argue for the first time in their petition to this Court, that the Board lacks the authority to fashion a reasonable standard of fraudulent concealment which arguably may not wholly comport with standards developed by federal courts regarding fraudulent concealment in other contexts. Thus, Petitioners are attempting to inject new issues into this case at this late stage, thereby depriving this Court of the benefit of the court of appeals' refinement and resolution of such issues. Because this Court has ruled that certiorari is inappropriate to decide

questions presented which were not pressed or passed upon below, certiorari should be denied in this case. *Yee*, 503 U.S. at 533.

II. Even If The Issues Were Properly Preserved, The Alleged Conflicting Cases Relied Upon By Petitioners Are Distinguishable On The Law.

A. The Decision Below Does Not Conflict With *DelCostello*.

Petitioners assert that certiorari should be granted because the decision of the court of appeals conflicts with the holding in *DelCostello*. Specifically, Petitioners assert that because the Board applied the six-month limitations period of Section 10(b) of the National Labor Relations Act (hereinafter "NLRA")[2] and the implied equitable tolling doctrine of fraudulent concealment to dismissed charges reinstated under Section 3(d) of the NLRA,[3] the Board was constrained by *DelCostello*, to adopt "the glosses on the fraudulent concealment doctrine set forth by the various Federal Courts." Petition at 3 (quoting *Brown & Sharpe Mfg. Co.*, 312 NLRB 444 n.3 (1993) (hereinafter, *Brown & Sharpe II*)). Petitioners' reliance on *DelCostello* is misplaced and their argument is wholly without merit.

DelCostello resolved the issue of whether federal courts should apply state statutes of limitations or the six-month statute of limitations of Section 10(b) of the

---

[2] 29 U.S.C. § 160(b).

[3] 29 U.S.C. § 153(d).

NLRA to breach of collective bargaining agreement/fair representation hybrid claims. The Court held that the § 10(b) six-month limitations period applies, reasoning that the six-month limitations period is more closely analogous to the federal claims than the available state limitations periods. *DelCostello*, 426 U.S. at 169-70.

The *DelCostello* Court was not presented with the issue of the extent of a federal agency's authority, in the face of congressional silence, to adopt a limitations period, including an implied equitable tolling provision, or to construct an appropriate standard for the equitable tolling provision. *DelCostello* does not address the authority of federal agencies at all. The sole question presented concerned the appropriate source from which to borrow a statute of limitations where there is no statute expressly applicable to a federal claim.[4] It would strain the bounds of logic to extend the holding in *DelCostello* to the present case. Such an application of *DelCostello* was neither considered nor contemplated by this Court.

---

[4] Justice Brennan, speaking for the *DelCostello* Court, framed the issue as follows:

> Each of these cases arose as a suit by an employee or employees against an employer and a union, alleging that the employer had breached a provision of a collective bargaining agreement, and that the union had breached its duty of fair representation by mishandling the ensuing grievance-and-arbitration proceedings. . . . The issue presented is what statute of limitations should apply to such suits.

DelCostello, 462 U.S. at 154.

B. The Decision Below is Consistent With *Chevron* And Its Progeny.

In *Ducane Heating Corp.*, 273 NLRB 1389 (1985), *enforced without op.*, 785 F.2d 304 (4th Cir. 1986), the Board held that a dismissed charge may not be reinstated outside of the six-month limitations period of § 10(b) absent special circumstances in which a respondent fraudulently conceals the operative facts underlying the alleged violation. *Ducane*, 273 NLRB at 1390. In *District Lodge 64 v. NLRB*, 949 F.2d 441 (D.C. Cir. 1991), the court of appeals upheld the *Ducane* rule as a permissible interpretation of § 10(b) of the Act. The court noted that "neither § 10(b) nor any other provision of the Act addresses the issue of time limits on revival of a dismissed charge." *District Lodge 64*, 949 F.2d at 445. The court stated that "[t]he statute's silence . . . clearly means that Congress has not 'directly spoken to the precise question at issue,' so that the Board is free to adopt any reasonable construction of the Act." *Id.* at 444 (quoting *Chevron USA, Inc. v. NRDC*, 467 U.S. 837 (1984)). The Court found that the Board's holding in *Ducane* reasonably promoted the policies underpinning § 10(b) of the Act:

> And we agree with the Board that Ducane reasonably promotes the policy of repose that § 10(b) contemplates. The rule gives charged parties "assur[ance] that, absent the existence of a properly served charge on file, [they] will not be liable for conduct occurring more than 6 months earlier," Ducane, 273 NLRB at 1391, and that they will not be called upon to defend themselves against stale charges "'after records

> have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused.' " . . .

District Lodge 64, 949 F.2d at 445.

The court remanded the case to the Board, however, to clarify the application of the fraudulent concealment exception to equitable tolling in this case. The court expressly noted that the Board was free to fashion its own standard regarding fraudulent concealment; it need not adopt the standard of the District of Columbia Circuit. *Id.* at 449. In its first supplemental decision and order, the Board adopted the standard of the District of Columbia Circuit for "material facts" but, significantly, did "not adopt all the glosses on the fraudulent concealment doctrine set forth by various Federal courts," thereby reserving the opportunity to diverge from the District of Columbia Circuit precedents in the future. *Brown & Sharpe II*, 312 NLRB at 444 n.5. In its second supplemental decision and order, the Board articulated its standard for determining when "fraudulent concealment" as the term was used in *Ducane* had occurred. It ruled that fraudulent concealment could not be found absent an affirmative act of concealment. The Board rejected the argument that a charged party commits fraudulent concealment (whether it knows it or not) each time it does not, on its own initiative, produce information or documents not requested by the General Counsel. *Brown & Sharpe III*, 321 NLRB at 924-25.

As set forth above, Petitioners did not raise and the court of appeals did not address whether the Board adopted an impermissible legal standard for fraudulent concealment. Even if the issue had been properly raised,

it is clear that the Board's formulation of fraudulent concealment was reasonable and, therefore, entitled to deference by the Court.

Addressing the Board Chairman's dissenting opinion as to the appropriate scope of the fraudulent concealment exception to equitable tolling, the majority wrote:

> We believe that this view is impractical and would actually hinder the Board's investigatory process. As the judge stated, a respondent in an unfair labor practice investigation is under no obligation to cooperate with the General Counsel in the investigation of the unfair labor practice charges, and may choose to supply no information whatsoever, if it so desires. Establishing a policy that holds a respondent open to a later charge of fraudulent concealment if it does not disclose unrequested information that relates to the investigation of an unfair labor practice charge is counterproductive. Many respondents may understandably decide that cooperating with the General Counsel's investigation is too onerous, in which case the Board's Regional Offices will be forced to put forth the time and expense of securing an investigatory subpoena in order to determine whether to issue a complaint.

Brown & Sharpe III, 321 NLRB at 924-25. The Board added that "where the General Counsel requests or subpoenas certain information and a respondent falsely denies that such information exists, deliberate concealment can be found." *Id.* Similarly, it wrote, "if a respondent affirmatively represented that it was providing *all* relevant material, while actually withholding certain information," a finding of deliberate concealment would be warranted. *Id.* (emphasis in original).

Petitioners cite authorities setting forth the standard, in other contexts, for fraudulent concealment which they assert "state the better principle" than the standard articulated by the Board.

However, as this Court held in *Chevron*,

> if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron, 467 U.S. at 843. "Judicial deference to reasonable interpretations by an agency of a statute that it administers is a dominant, well-settled principle of federal law." *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 112 S. Ct. 1394, 1401 (1992).

Petitioners' asserted basis for certiorari is essentially that the Board should have adopted a different standard for fraudulent concealment. In light of the deference that must be accorded to the Board's reasonable interpretations of the Act and the important public policies underpinning the Board's standard for fraudulent concealment, Petitioners' argument does not warrant consideration by this Court and, thus, certiorari should be denied.

III. Question C., As Presented, Is No More Than A Request Of This Court To Revisit the Board's Findings of Fact.

Petitioners' third Question Presented is as follows:

> Where the National Labor Relations Board failed to consider material evidence indicating that a charged party gave an investigator a false impression of full and voluntary cooperation,

> when in fact the charged party withheld material evidence, did the court of appeals erroneously defer to the board's determination that the charged party did not engage in an affirmative act of concealment?

Petition at i.

In essence, Petitioners ask this Court to review the lengthy record to see if it can find what an administrative law judge, the Board and the court of appeals all have been unable to find – proof of an affirmative act by Brown & Sharpe to fraudulently conceal the steering committee minutes. Supreme Court Rules and this Court's precedent establish that certiorari should not be granted to review evidence and discuss specific facts. *See United States v. Johnson*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); Supreme Court Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.")

Even if this Court were to review the record (which Intervenor maintains is inappropriate), it would be clear that there is substantial evidence of record which supports the decision of the court of appeals to uphold the findings of fact and conclusions of law of the Board.

The evidence adduced before the Administrative Law Judge conclusively established that Brown & Sharpe committed no affirmative act of concealment whatsoever. There is absolutely no evidence of record to support Petitioners' representation in their brief to this Court that

"the board's own investigator was duped by the company's misrepresentations into not asking the right questions."[5] Petition at 13.

To the contrary, it was "no secret" that the Steering Committee held meetings to prepare for negotiations. (Tr. at 1093, 1121 (testimony of Waterman), App. at 435, 436.) Prior to the expiration of the § 10(b) limitations period, *both the Union and the General Counsel* were aware of the existence of the Steering Committee. Field Attorney Kevin Murray, who investigated the case, testified as follows:

> Q Do you remember how long after the charge was filed that you met with Mr. Thayer?[6]
>
> A I believe it may have been less than a week. I think I met with Mr. Thayer at least twice before I wound up meeting with the company in this case.
>
> . . . .
>
> Q Now, when you met with Mr. Thayer, do you recall if there was any discussion or any mention of a steering committee?
>
> A I believe at least at some point during the first two meetings, when I was going over with [Mr. Thayer] the background of the

---

[5] Petitioner here, as below, consistently has recourse to pejoratives such as "duped," "intentionally misled," "lied," "ruse," apparently on the assumption that these characterizations, if repeated often enough, will compensate for the absence of any evidence whatever that the Company deliberately withheld information from the investigation.

[6] Robert Thayer was the Business Representative for the Union. (Tr. at 301, App. at 343.)

company and its relations with the union, I think he mentioned to me that there was something that the company had in this negotiation that they hadn't had in prior negotiations, and he called it a steering committee.

Q Did he explain further what was his problem with the steering committee or define it?

A My understanding at that time was that it had some kind of oversight functions over the negotiations, that Dick Jocelyn was the chief negotiator and that he in some fashion reported to or was supervised by the steering committee. . . .

(Tr. at 1007-1008, App. at 412-13.)

Thus, the field attorney investigating the charges knew that the Steering Committee had a role in the negotiation process, yet failed to inquire as to its specific role and whether it kept minutes or other documents. (Tr. at 1012-1015, 1127, App. at 417-42, 437.) Simply put, as found by the ALJ, "[t]here was no misstatement . . . because important questions were never asked and pertinent information was never demanded." (SD&O II, App. at 429, 437.)

Significantly, Petitioners do not argue and the record evidence does not establish that Brown & Sharpe ever denied the existence of the Steering Committee notes. To the contrary, as found by the Board and as supported by the record, when the General Counsel asked for the notes at issue, Brown & Sharpe promptly produced the evidence. (Tr. at 1041, 1127, App. at 429.) However, as the Board concluded, Brown & Sharpe was under no duty to

spontaneously produce the Steering Committee documents prior to that request. Thus, Brown & Sharpe committed no fraud in not volunteering these documents, and the Court of Appeals properly upheld the Board's dismissal of the charges here at issue.

Finally, Petitioners do not argue and the evidence of record does not establish that Brown & Sharpe ever stated that it was providing *all* relevant material. Rather, Brown & Sharpe provided all *requested* material. The evidence establishes that, during the initial investigation, the field attorney's request was limited to all notes taken during the negotiation sessions and all correspondence exchanged by the parties, which Brown & Sharpe promptly provided. (Tr. at 1010, App. at 415.)

Thus, the evidence of record establishes that (1) the General Counsel knew of the Steering Committee and that it held meetings, (2) upon learning of the Steering Committee, the General Counsel did not request the Steering Committee minutes, (3) Brown & Sharpe was under no obligation to disclose, *sua sponte*, unrequested information, (4) Brown & Sharpe never denied the existence of the Steering Committee minutes, (5) Brown & Sharpe never represented that it had given all arguably material evidence, and (5) when asked for the minutes, Brown & Sharpe promptly disclosed them. How then was the General Counsel "duped" by Brown & Sharpe?

Contrary to the assertions by Petitioners, the Board's standard for fraudulent concealment which requires an affirmative act of misrepresentation is reasonable. Mere silence or failure to reveal information which the non-

disclosing party has no duty to disclose can never support a finding of fraudulent concealment.

Petitioners' allegation of fraudulent concealment is based solely on Brown & Sharpe's failure to turn over, on its own initiative, unrequested Steering Committee notes. Because Brown & Sharpe was under no duty to reveal this information, absent a request by the General Counsel, and because there is no evidence whatsoever that Brown & Sharpe made affirmative misrepresentations to the General Counsel, the court of appeals correctly upheld the Board's conclusion that the company did not engage in fraudulent concealment and, therefore, correctly dismissed the unfair labor charges in this case.

IV. The Petition For Certiorari Does Not Present An Important Federal Question.

Petitioners assert that this Court should issue a Writ of Certiorari in this case because the decisions below "involve important questions of federal law concerning the authority of respondent, National Labor Relations Board (board), to interpret and apply equitable tolling standards to a borrowed federal statute of limitation." Petition at 3. Even a cursory examination of the Petitioners' asserted reasons, however, reveals that this case does *not* present an important federal question which warrants review by this Court. To the contrary, this case involves deference by a court of appeals to an agency's reasonable interpretation and the decision below is faithful to the well-established principles set forth in *Chevron* and its progeny (*see* Argument II B, *supra*). Whether there

exists a standard, in other contexts, for defining fraudulent concealment for tolling purposes which allegedly "states the better principle" than the standard adopted by the Board is not an adequate basis upon which to grant certiorari. It is well-established that the proper inquiry is not whether the Board's standard is the "better rule of law," but whether the Board's standard is reasonable. *Chevron*, 467 U.S. at 866. As fully set forth above, and as confirmed by the court of appeals, the Board's standard is a reasonable interpretation of the NLRA and its findings of fact are adequately supported by substantial evidence of record. Accordingly, there are no "compelling reasons" for granting certiorari in this case.

CONCLUSION

For the reasons set forth above, Intervenor, Brown & Sharpe, respectfully requests that this Court deny Petitioners' Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

Brown & Sharpe Manufacturing Co.
By its Attorneys,
POWERS, KINDER & KEENEY, INC.
WILLIAM R. POWERS, III
THOMAS C. KEENEY

(3)

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In the Supreme Court of the United States

OCTOBER TERM, 1997

DISTRICT LODGE 64, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, ETC., ET AL., PETITIONERS

v.

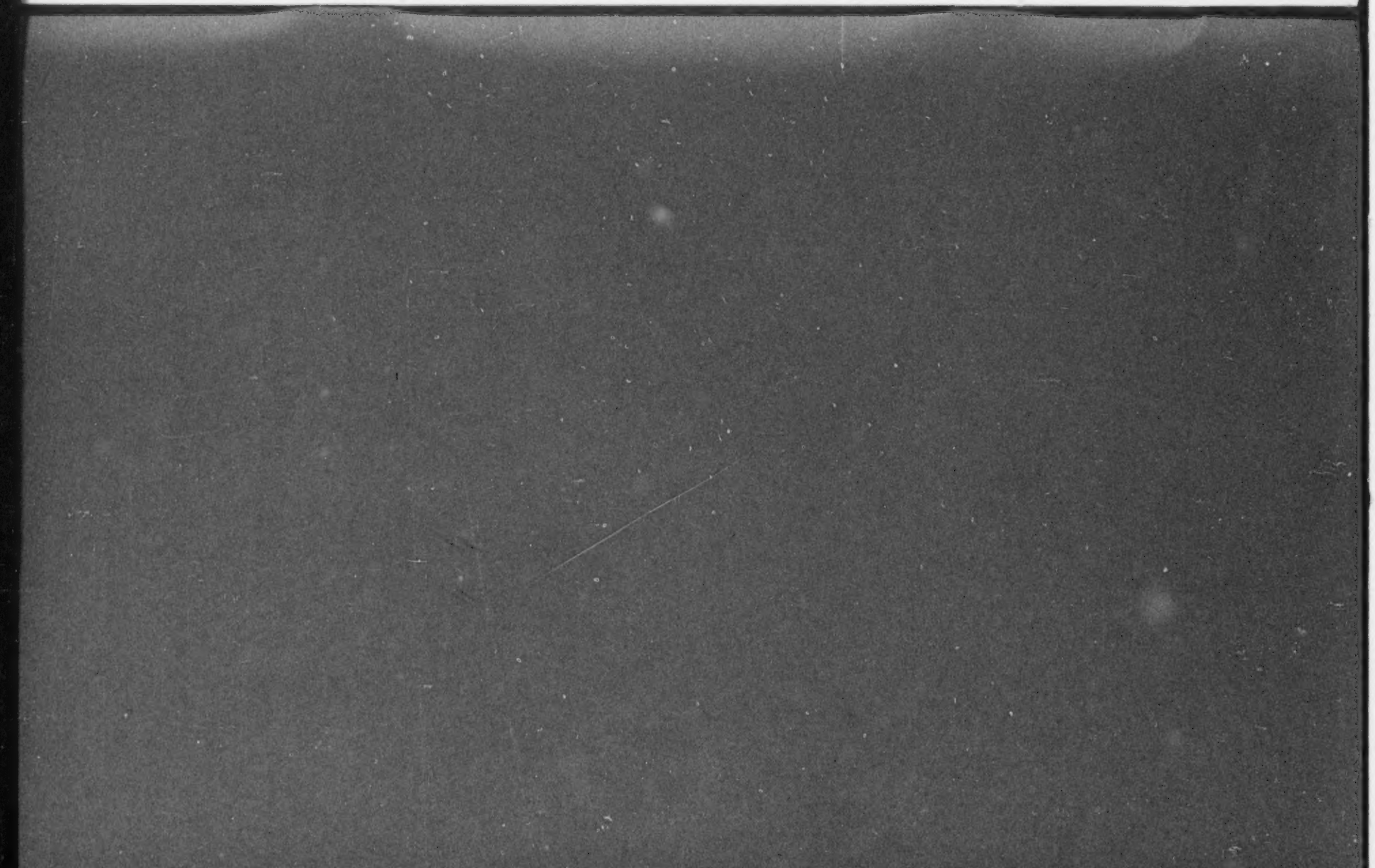
NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530
(202) 514-2217

FREDERICK L. FEINSTEIN
Acting General Counsel
LINDA SHER
Associate General Counsel
NORTON J. COME
Deputy Associate General Counsel
JOHN EMAD ARBAB
Attorney
National Labor Relations Board
Washington, D.C. 20570



QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that the employer did not fraudulently conceal internal company documents during the General Counsel's investigation of the union's unfair labor practice charge.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1515

DISTRICT LODGE 64, INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, ETC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals after the second remand (Pet. App. 1-12) is reported at 130 F.3d 1083. The second supplemental decision and order of the National Labor Relations Board (Board) on remand (Pet. App. 13-21) is reported at 321 N.L.R.B. 924. The opinion of the court of appeals after the first remand (Pet. App. 22-38) is reported at 50 F.3d 1088. The Board's supplemental decision and order on remand (Pet. App. 39-50) is reported at 312 N.L.R.B. 444. The initial opinion of the court of appeals remanding the case to the Board (Pet. App. 51-70) is reported at 949

F.2d 441. The Board's initial decision and order (Pet. App. 71-88) and the decision of the administrative law judge (Pet. App. 89-189) are reported at 299 N.L.R.B. 586.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 1997. The petition for a writ of certiorari was filed on March 12, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In 1981, Brown & Sharpe Manufacturing Company (Brown & Sharpe) was engaged in the manufacture and sale of precision machine tools at two plants in Rhode Island. Pet. App. 95-96. In July 1981, petitioner District Lodge 64, International Association of Machinists & Aerospace Workers, AFL-CIO (Union), asked Brown & Sharpe to begin negotiations for new collective-bargaining agreements. *Id.* at 97.[1] Negotiations began in September 1981. *Id.* at 111. At the bargaining table, Brown & Sharpe took the position that certain of its bargaining proposals were "absolutes," *i.e.*, "provisions that [Brown & Sharpe] had to have" in the new labor contracts; the Union, however, regarded Brown & Sharpe's "absolutes" as constituting a "clear strike issue." *Id.*

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[1] Brown & Sharpe's production and maintenance employees were represented by the Union's Local Lodges 1088 and 1142; the company's clerical employees were represented by the Union's Local Lodge 833. Pet. App. 96-97. Local Lodges 833, 1088, and 1142 were parties to this litigation in the court of appeals (*id.* at 2, 22, 51), and are petitioners before this Court. Pet. 2. Because the nominal distinction among them is not relevant here, we refer to District Lodge 64 and the Local Lodges collectively as "the Union" or "petitioner."

at 116-117.[2] On October 18, the Union began a strike against Brown & Sharpe. *Id.* at 91.

b. On November 5, 1981, the Union filed an unfair labor practice charge with the Board, alleging that Brown & Sharpe had failed to bargain with it in good faith, contrary to Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(a)(1) and (a)(5). Pet. App. 90. On December 28, 1981, after an investigation, the Board's Acting Regional Director dismissed the Union's charge. *Id.* at 91. The Acting Regional Director found "no evidence" that Brown & Sharpe had advanced its "absolutes" to "frustrat[e] or imped[e] the collective bargaining process"; rather, "it appear[ed] from the investigation" that Brown & Sharpe made its proposals "only because of the lawful business consideration of attempting to increase production." *Ibid.* The Union appealed the dismissal of its charge to the Board's General Counsel; on January 29, 1982, the General Counsel denied the Union's appeal. *Ibid.*; see also 29 C.F.R. 102.19(a) and (c).

2. On September 29, 1982, the Union filed a new charge alleging that, prior to the commencement of negotiations, Brown & Sharpe had fired David Waterman, its director of industrial relations, for "refusing to carry out a bargaining position designed to preclude reaching agreement with the Union." Pet. App. 94. Pursuant to a supplemental investigation, the General Counsel obtained the minutes and position papers of Brown & Sharpe's "steering committee," a group of management officials that had

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[2] Brown & Sharpe's "absolutes" involved proposals regarding employee job preference and mandatory employee transfers. Pet. App. 75 & n.3, 114-115.

formulated the company's bargaining strategy. *Id.* at 53, 72, 94. In the General Counsel's view, the steering-committee documents showed that, contrary to its ostensible position at the bargaining table, Brown & Sharpe actually regarded its "absolutes" as "insignificant to [the] operation of its business," and had advanced those proposals to "induce[] the Union to strike." *Id.* at 104.

On September 27, 1983, the General Counsel, relying upon the steering-committee documents, reinstated the Union's previously dismissed charge. Pet. App. 72, 94-95. Based on the reinstated charge, the General Counsel issued a complaint alleging, in part, that Brown & Sharpe had engaged in unlawful "surface bargaining" with the Union "by insisting, without valid economic considerations, on certain proposals as absolute." *Id.* at 72, 84-85.[3]

3. a. The administrative law judge (ALJ) dismissed the General Counsel's complaint as untimely to the extent the complaint sought to reinstate the dismissed charge. Pet. App. 98-108; see also *id.* at 190-208. The ALJ relied on the Board's rule that the General Counsel cannot reinstate a dismissed unfair labor practice charge "outside the 6-month limitations period of Section 10(b) [of the NLRA] absent special circumstances in which a [charged party] fraudulently conceals the operative facts underlying the alleged violation." *Ducane Heating Corp.*, 273 N.L.R.B. 1389, 1390 (1985), enforced mem., 785 F.2d

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[3] "Surface bargaining" occurs when "a party simply attempts to make it appear that it is willing to reach an agreement, although it has no intention to do so." Pet. App. 164.

304 (4th Cir. 1986).[4] The ALJ found that the General Counsel had reinstated the dismissed charge after the six-month limitation period had expired, and that the General Counsel had failed to justify the untimely reinstatement of the charges under the "fraudulent concealment" exception provided by *Ducane*. Pet. App. 107. The ALJ found that there was "no proof that [Brown & Sharpe] committed any fraud" in connection with the General Counsel's investigation of the dismissed charge, *ibid.*; rather, the ALJ noted, "the Union had made the [General Counsel's] field attorney aware of the existence of the steering committee," but the General Counsel's field attorney had "fail[ed] to ask [Brown & Sharpe] for all documents which related to the 'absolutes' or to the steering committee," *id.* at 106.

b. The Board affirmed the ALJ's dismissal order, but on a different ground. Pet. App. 72-85 (*Brown & Sharpe I*). Applying *Ducane*, the Board concluded that, whether or not Brown & Sharpe had fraudulently concealed the steering-committee documents, those documents "do not support the allegation that [Brown & Sharpe] engaged in surface bargaining." *Id.* at 84. Accordingly, the Board found that "[Brown & Sharpe's] failure to disclose them * * * could not amount to a fraudulent concealment of the operative

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[4] Section 10(b) of the NLRA, 29 U.S.C. 160(b), provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." Although Section 10(b) does not directly apply in cases in which a charge is timely filed with the Board but then dismissed, the Board in *Ducane* concluded that it would be appropriate to apply the limitation period of Section 10(b) in such cases.

facts underlying the alleged violation of Section 8(a)(5)." *Id.* at 84-85.

c. The court of appeals affirmed in part the Board's decision in *Brown & Sharpe I*, and remanded the case to the Board for further consideration. Pet. App. 51-70. The court held that "*Ducane* is a reasonable implementation of the policy behind [Section] 10(b)." *Id.* at 54-55.[5] The court concluded, however, that the Board's decision in *Brown & Sharpe I* "le[ft] completely obscure just how significant the facts must be" to constitute "operative facts" within the meaning of *Ducane*'s "fraudulent concealment" exception. *Id.* at 68. Citing *Fitzgerald* v. *Seamans*, 553 F.2d 220, 228 (D.C. Cir. 1977), the court explained that, under its case law, "deliberate concealment of *material* facts" will generally toll a federal-law statute of limitations. Pet. App. 68. Because the Board in *Brown & Sharpe I* had not "explicitly embrace[d] any standard," the court remanded the case for the Board "to explain its application of the fraudulent concealment exception." *Id.* at 55, 68, 70.

4. a. On remand, the Board issued a supplemental decision dismissing the complaint. Pet. App. 39-50 (*Brown & Sharpe II*). The Board explained that it

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[5] The court explained that, because "neither [Section] 10(b) nor any other provision of the Act addresses the issue of time limits on revival of a dismissed charge," the Board "may fill this 'gap' in the statutory scheme pursuant to its authority to implement that scheme." Pet. App. 56-57 (citing *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844 (1984)). The court concluded that "*Ducane* reasonably promotes the policy of repose that [Section] 10(b) contemplates," and that "[t]he Board's decision to 'borrow' a fixed period of limitations, rather than to adopt a laches rule, is also within its discretion under the Act." *Id.* at 57-58.

"agree[d] with the *Fitzgerald* standard," and that, by using the term "operative facts" in *Brown & Sharpe I*, the Board had not "intend[ed] to denote a disagreement with the standard of 'material facts.'" *Id.* at 42. The Board also noted that, although it "consistently has applied the equitable doctrine" of fraudulent concealment, it "do[es] not necessarily adopt all the glosses on the fraudulent concealment doctrine set forth by various [f]ederal courts." *Id.* at 40, 41 n.5. The Board found that the steering-committee documents "do not constitute material facts" because "they do not make a critical difference in establishing a violation." *Id.* at 49. The Board therefore concluded that "the alleged concealment of these facts does not toll the [Section] 10(b) period." *Ibid.*

b. The court of appeals vacated the Board's decision in *Brown & Sharpe II* and remanded the case to the Board for further consideration. Pet. App. 22-38. The court concluded that "the allegedly concealed evidence is sufficient to overcome a motion to dismiss, because the documents contain statements that certainly support a claim of surface bargaining." *Id.* at 36. Accordingly, the court held, the documents constituted "material evidence for purposes of the *Ducane* rule." *Id.* at 37. The court therefore remanded the case to the Board "for a determination of whether the evidence, though material, was actually fraudulently concealed." *Ibid.*

5. a. On remand, the Board issued a second supplemental decision dismissing the complaint. Pet. App. 13-21 (*Brown & Sharpe III*). A majority of the Board upheld the conclusion of the ALJ in *Brown & Sharpe I* that Brown & Sharpe had not fraudulently concealed the steering-committee documents. *Id.* at 13-15; see

also *id.* at 105-107. The Board explained that, "[i]n order to find that there has been concealment, there must be 'some positive act tending to conceal the cause of action from the plaintiff, although any word or act tending to suppress the truth is enough.'" *Id.* at 15 (quoting *Richards* v. *Mileski*, 662 F.2d 65, 70 (D.C. Cir. 1981)). The Board found that Brown & Sharpe "did not engage in any affirmative act of concealment," and that "[t]here is no indication of 'any word or act' that was designed to suppress the truth from the General Counsel." Pet. App. 15.[6]

The Board explained that, although a finding of fraudulent concealment may be appropriate "where the General Counsel requests or subpoenas certain information and a [charged party] falsely denies that such information exists," or "affirmatively represent[s] that it [is] providing *all* relevant material, while actually withholding certain information," the Board emphasized that "[n]either is the situation here." Pet. App. 16-17. The Board rejected the argument that Brown & Sharpe should be deemed to have engaged in fraudulent concealment "because it did not, on its own initiative, produce an item that was not requested by the General Counsel," concluding that "this view is impractical and would actually hinder the Board's investigatory process." *Id.* at 16.[7]

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[6] The Board found that Brown & Sharpe "voluntarily cooperated" with the General Counsel's initial investigation, that it "produced, as requested, bargaining notes, correspondence, proposals and counterproposals," and that "[w]hen, during the course of a later investigation, [Brown & Sharpe] was asked for the evidence at issue, it produced that evidence without delay." Pet. App. 15.

[7] Board Chairman Gould dissented, finding that "fraudulent concealment has occurred by virtue of [Brown & Sharpe's]

b. The court of appeals affirmed the Board's decision in *Brown & Sharpe III*. Pet. App. 1-12. The court explained that "[t]he crux of [the Union's] argument is that merely by cooperating with the General Counsel's investigation without divulging all of the information it knew to be relevant, Brown & Sharpe performed an affirmative act of concealment." *Id.* at 9. The court rejected that contention, finding "little question" that substantial evidence supported the Board's determination that "Brown & Sharpe did not intend its participation as a ruse to prevent the Board from finding the steering committee position papers." *Id.* at 9, 10.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Particularly in view of petitioner's repeated concession that "this case is factually *sui generis*" (Pet. 15; see also Pet. 5, 18, 22), further review is not warranted.

1. Petitioner claims (Pet. 3-4, 14) that the Board is not free to develop its own doctrine of fraudulent concealment, but rather must apply that doctrine as it has been developed by the federal courts as a matter of federal common law. That claim is not properly presented and in any event lacks merit.

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withholding of the steering committee documents." Pet. App. 18. Chairman Gould argued that "[t]hat information rested solely with [Brown & Sharpe], and when it chose to affirmatively withhold that information while giving the General Counsel the impression that it was fully cooperating with the rest of the investigation, an affirmative act of concealment took place." *Ibid.*

a. In *Brown & Sharpe II*, the Board indicated that it viewed itself as free to develop its own doctrine of fraudulent concealment. Pet. App. 40, 41 n.5. At no point during the further proceedings before the Board did petitioner contend to the contrary. Because petitioner failed to present its claim to the Board, and has not pointed to "extraordinary circumstances" justifying that failure, this Court lacks jurisdiction to consider the claim. See 29 U.S.C. 160(e) ("No objection that has not been urged before the Board * * * shall be considered by the [reviewing] court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."). See also, *e.g.*, *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665 (1982).

Moreover, petitioner did not advance the claim in the court of appeals, and the court of appeals did not pass on it. See Pet. App. 8-9 (court of appeals notes that petitioner did "not contend[] that the Board adopted an erroneous legal standard for fraudulent concealment," but rather contended only that "the Board misconstrued and misapplied this court's precedent when it found that Brown & Sharpe had not fraudulently concealed the steering committee documents"). This Court ordinarily does not consider issues that were not "pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992).

b. Even if it were properly presented, petitioner's claim is without merit. Under the NLRA, Congress conferred on the Board "the authority to develop and apply fundamental national labor policy." *Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 500 (1978). As it exercises that authority, the Board is not bound by "canons for equitable relief deemed suitable by chancellors in ordinary private controversies." *Phelps*

Dodge Corp. v. *NLRB*, 313 U.S. 177, 188 (1941). Cf. *NLRB* v. *Town & Country Elec., Inc.*, 516 U.S. 85, 92-94 (1995) (Board's interpretation of statutory term "employee" is entitled to deference even if that interpretation diverges from common-law principles). Indeed, the Board's discretion is especially pronounced where, as here, it is elaborating upon its own case law with respect to a matter that Congress has not specifically addressed. See note 5, *supra*. Thus, the Board would be well within its authority if it were to conclude that "industrial relations policy favoring finality in the resolution of labor disputes" justified adoption of a relatively restrictive approach to the circumstances in which fraudulent concealment would permit reinstatement of an unfair labor practice charge that had previously been dismissed. *Truck Drivers & Helpers Union, Local No. 170* v. *NLRB*, 993 F.2d 990, 999 (1st Cir. 1993).

The two cases upon which petitioner relies (Pet. 13-14) are not to the contrary. In *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946), the Court held that principles of equitable tolling were applicable to federal claims sounding in equity. In *DelCostello* v. *International Brotherhood of Teamsters*, 462 U.S. 151 (1983), the Court held that the six-month limitation period in Section 10(b) of the NLRA, 29 U.S.C. 160(b), should be applied to an employee's claims that an employer breached a collective-bargaining agreement and that a union breached its duty of fair representation by mishandling the ensuing grievance. Neither *Holmberg* nor *DelCostello* suggests that the Board would lack authority to develop its own doctrine of fraudulent concealment to determine the circumstances in which it would be appropriate to

permit the reinstatement of an unfair labor practice charge that had previously been dismissed.

c. In any event, the Board in this case did not diverge from the federal common law of fraudulent concealment. In concluding that petitioner had failed to establish fraudulent concealment, the Board relied on *Richards* v. *Mileski*, 662 F.2d 65 (D.C. Cir. 1981) (see Pet. App. 15 & n.6), and adopted an approach consistent with that generally followed by the federal courts. See, *e.g.*, *Pinney Dock & Transport Co.* v. *Penn Cent. Corp.*, 838 F.2d 1445, 1469 (6th Cir.) ("[m]ost of the appellate cases which have addressed the issue in the context of antitrust actions have required * * * affirmative concealment" to establish fraudulent concealment), cert. denied, 488 U.S. 880 (1988); *Volk* v. *D.A. Davidson & Co.*, 816 F.2d 1406, 1415 (9th Cir. 1987) (to establish fraudulent concealment in a federal securities-fraud action, plaintiff must demonstrate "affirmative conduct upon the part of the defendant"); *Taylor* v. *Meirick*, 712 F.2d 1112, 1118 (7th Cir. 1983) (" 'fraudulent concealment' implies active misconduct"). Although petitioner cites several cases that it contends articulate a standard different from the Board's (see Pet. 18), only one of those cases actually addresses the fraudulent-concealment doctrine, and that case supports the Board's conclusion in the present case.[8]

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[8] *Baskin* v. *Hawley*, 807 F.2d 1120 (2d Cir. 1986), addresses fraudulent concealment and applies a test similar to the Board's. See *id.* at 1130-1131 (finding fraudulent concealment based on "evidence of active concealment"); see also *id.* at 1132 (noting "ample evidence of falsehoods and half-truths"). The other cases cited by petitioner describe the elements of various causes of action sounding in fraud, and do not discuss the fraudulent-concealment doctrine. See *Milton* v. *Van Dorn Co.*,

2. Petitioner contends (Pet. 15-16) that "[t]he purpose of equitable tolling is to prevent persons from taking advantage of their own wrongs by concealing potentially valid claims," and that the Board's requirement that there be an "affirmative act" of concealment "entirely defeat[s]" that purpose, because it excludes "common (and myriad) forms of trick, artifice, and contrivance by which an investigator may be misled or deceived." Petitioner's argument is based on a mischaracterization of the Board's decision.

As the Board explained in the present case, "any word or act tending to suppress the truth is enough" to constitute fraudulent concealment. See Pet. App. 15. In a case in which the evidence demonstrates that the charged party misled the General Counsel by "trick or artifice" during the investigation of a union's charge, the Board would be free to find that the charged party had engaged in fraudulent concealment, for such a course of conduct would certainly involve some "word or act tending to suppress the truth." *Ibid.* In the present case, however, the Board found as a factual matter that Brown & Sharpe had not engaged in such conduct respecting the steering-committee documents, and that the General Counsel's investigator had simply failed to ask Brown & Sharpe to produce them. See *id.* at 9-11, 13-15. Although petitioner asserts (Pet. 19) that Brown &

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961 F.2d 965, 968-969 & n.4 (1st Cir. 1992) (describing circumstances in which "duty to disclose may arise" under anti-fraud provision of federal securities law); *Ellis* v. *Zuck*, 409 F. Supp. 1151, 1157 (N.D. Ala. 1976) (describing circumstances in which "liability for nondisclosure or suppression of facts will arise" under Alabama law of fraud), aff'd, 546 F.2d 643 (5th Cir. 1977).

Sharpe's failure to produce the documents unilaterally was "deliberately misleading," the court of appeals' contrary assessment of the evidentiary record raises no issue warranting further review. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

3. Petitioner also contends (Pet. 19-21) that the Board would have found that Brown & Sharpe had engaged in fraudulent concealment had the Board not "overlooked the most critical facts," namely, the steering-committee documents and the testimony of David Waterman. According to petitioner, "the court of appeals clearly signalled to the [B]oard in its second opinion that it was to consider those facts in determining whether the company had engaged in fraudulent concealment," but "the [B]oard ignored them." Pet. 20. Petitioner's argument is without merit.

In *Brown & Sharpe II*, the court of appeals examined the steering-committee documents and the affidavit of David Waterman only to determine whether that evidence was material to petitioner's charge of surface bargaining. See Pet. App. 35-37. Having answered that question in the affirmative, the court remanded the case to the Board for a determination "whether the evidence, though material, was actually fraudulently concealed." *Id.* at 37. The court expressed no view on the latter issue. Moreover, the court of appeals in *Brown & Sharpe III* upheld as "unassailable" the Board's "factual determination that there was no affirmative act of fraudulent concealment by the company." *Id.* at 11. That conclusion raises no issue warranting further review. *Universal Camera Corp., supra.*

4. Finally, petitioner asserts (Pet. 4-5, 21-22) that "[t]he tolerance of the court of appeals and the [B]oard for the extinction of the union's rights under the Act is manifestly unjust." Pet. 21. That is so, according to petitioner, because the Board "attribute[d] the dismissal of the union's charges exclusively to the investigatorial misfeasance of the General Counsel," Pet. at 5, and under *NLRB* v. *J.H. Rutter-Rex Manufacturing Co.*, 396 U.S. 258 (1969), "the consequences of the [B]oard's misfeasance should not be visited on innocent parties," Pet. 22. There is no merit to petitioner's contention.

As the court of appeals explained, "the consequence of a statutory scheme that empowers only the General Counsel to issue complaints is that some party must bear the risk of negligence on the part of the General Counsel's office." Pet. App. 11-12; see also 29 U.S.C. 153(d). Thus, "[i]nvestigative foul-ups by the General Counsel necessarily burden one party or another (the charging party under *Ducane*, the charged party under its opposite); neither inequity is necessarily greater than the other, and it is within the Board's discretion to strike the balance as it has." Pet. App. 12 (quoting *id.* at 67).

Contrary to petitioner's suggestion (Pet. 22 & n.16), the court's conclusion is not inconsistent with *Rutter-Rex*, *supra*. In *Rutter-Rex*, the Court held that, when computing backpay awards to remedy unfair labor practices, "the Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers." 396 U.S. at 265. In the present case, however, Brown & Sharpe has not been found to have violated the NLRA, and therefore it is not in the position of a "wrongdoing employer."

Moreover, while the Court held in *Rutter-Rex* that the Board is not *required* "to place the consequences of its own delay * * * upon wronged employees," the Court did not conclude that the Board would lack authority to adopt such a policy in appropriate circumstances. *Ibid.* As this Court has explained in a different context, "[t]he ultimate problem is the balancing of the conflicting legitimate interests," and "[t]he function of striking that balance * * * is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *Beth Israel Hosp.*, 437 U.S. at 501 (quoting *NLRB* v. *Truck Drivers*, 353 U.S. 87, 96 (1957)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

FREDERICK L. FEINSTEIN
Acting General Counsel

LINDA SHER
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board

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